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No. 93-7348

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1993

RICKY LEE PRICE,

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

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The Respondent, the State of North Carolina, by and through its undersigned counsel, the Honorable Michael F. Easley, Attorney General of North Carolina and Special Deputy Attorney General Barry S. McNeill, respectfully opposes and requests this Court to deny the Petition for Writ of Certiorari filed by Petitioner Ricky Lee Price seeking review of the decisions by the North Carolina Supreme Court in State v. Price, 326 N.C. 56, 388 S.E.2d 84, vacated and remanded sub nom., Price v. North Carolina, 498 U.S. 802 (1990), reaff'd in, State v. Price, 331 N.C. 620, 418 S.E.2d 169 (1992), vacated and remanded sub nom., Price v. North Carolina, ___ U.S. ___, 113 S.Ct. 955 (1993),

reaff'd in, State v. Price, 334 N.C. 615, 433 S.E.2d 746 (1993). (P.App. 1-27, 28, 29, 30-39, 40, 41, 42-44, 45)[1]

OPINION BELOW

JURISDICTION

CONSTITUTIONAL AMENDMENTS AND STATUTES INVOLVED

Pursuant to Supreme Court Rules 15.2 and 24.2, these items are omitted since the Respondent is satisfied with the Petitioner's statements of the OPINION BELOW, JURISDICTION, and CONSTITUTIONAL AMENDMENTS AND STATUTES INVOLVED.

STATEMENT OF THE CASE

A. Procedural History

The Petitioner, Ricky Lee Price, was tried at the September 8, 1987 Criminal Session of Person County Superior Court for the first-degree murder of Brenda Leigh Smith in violation of N.C.Gen.Stat. §14-17 (1981). The jury found the Petitioner guilty as charged and a capital sentencing hearing was held pursuant to N.C.Gen.Stat. §15A-2000 (1983). (P.App. 46-47) On September 24, 1987, the jury unanimously recommended that the Petitioner be sentenced to death. (P.App. 48-51, 107-110)

Afterwards, the jurors were polled individually and each one assented to the answers on the "Issues and Recommendation as to

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1 References herein to "P.App. ___" are to the Petitioner's Appendix to his Petition for Writ of Certiorari. References to "T Vol. ___ p ___" are to one of the seven volumes of the trial transcript. References to "R.App. ___" are to the State's Appendix to its Brief in Opposition herein.

Punishment" form as to the finding of aggravating and mitigating circumstances, as well as the unanimous recommendation of the death sentence. (P.App. 110-18) The trial judge then entered the judgment sentencing the Petitioner to death for the first-degree murder of Brenda Leigh Smith.

The Petitioner gave notice of appeal in open court, and the Office of the Appellate Defender was appointed on appeal. The appeal was heard on December 14, 1989, and on February 7, 1990 the North Carolina Supreme Court rendered its opinion unanimously affirming the conviction and death sentence. State v. Price, 326 N.C. 56, 388 S.E.2d 84 (1990); (P.App. 1-27). Pursuant to N.C.R.App.P. 32(b) (1990), the judgment of the North Carolina Supreme Court was certified and entered on the docket on February 27, 1990. (P.App. 28)

On June 27, 1990, the Petitioner filed in the United States Supreme Court and served on the State a Petition for Writ of Certiorari to the Supreme Court of North Carolina, arguing inter alia that the trial court's sentencing instructions violated Mills v. Maryland, 486 U.S. 367 (1988) and the intervening decision in McKoy v. North Carolina, 494 U.S. 433 (1990). Price v. North Carolina, No. 90-5045 (PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA, filed June 27, 1990, at 11-13).

On October 1, 1990, the United States Supreme Court summarily granted certiorari, vacated the judgment of the North

Carolina Supreme Court, and remanded the case "for further consideration in light of McKoy v. North Carolina, 494 U.S. 433 (1990)." Price v. North Carolina, 498 U.S. 802 (1990); (P.App. 29).

On October 3, 1990, the North Carolina Supreme Court ordered the parties to file supplemental briefs limited to the questions of whether there was McKoy error, and, if so, whether such error was harmless beyond a reasonable doubt. State v. Price, 327 N.C. 479, 397 S.E.2d 233 (1990). Following the reargument of the case on April 10, 1991, on June 25, 1992 the North Carolina Supreme Court again unanimously affirmed the Petitioner's death sentence and remanded the case "to the Superior Court, Person County, for further proceedings." State v. Price, 331 N.C. 620, 635, 418 S.E.2d 169, 178 (1992); (P.App. 30-39). Pursuant to N.C.R.App.P. 32(b) (1990), the judgment of the North Carolina Supreme Court was certified and entered on the docket on July 15, 1992. (P.App. 40)

The Petitioner filed his second Petition for Writ of Certiorari on October 13, 1992. Price v. North Carolina, No. 92-6239 (PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA, filed Oct. 13, 1992). On January 11, 1993, the United States Supreme Court summarily granted certiorari, vacated the judgment of the North Carolina Supreme Court, and remanded the case "for further consideration in light of Morgan v.

Illinois, [501 U.S. ___, 112 S.Ct. 2222] (1993)." Price v. North Carolina, ___ U.S. ___, 113 S.Ct. 955 (1993).

Following supplemental briefing, the case was reargued for a third time on May 12, 1993, and on September 10, 1993 the North Carolina Supreme Court again unanimously affirmed the Petitioner's death sentence. State v. Price, 334 N.C. 615, 433 S.E.2d 746 (1993). (P.App. 42-44) Pursuant to N.C.R.App.P. 32(b) (1993), the judgment of the North Carolina Supreme Court was certified and entered on the docket on September 30, 1993. (P.App. 45)

On December 29, 1993, the next-to-last day of the 90-day filing period, Supreme Court Rule 13.1, the Petitioner forwarded his third Petition for Writ of Certiorari [hereinafter "PWC"] to this Court seeking review of the decisions on direct appeal by the North Carolina Supreme Court.

B. **Factual Background**

1. Guilt-Phase Evidence

On Sunday morning, October 21, 1984, at approximately 10:00 a.m., Ann and Tony Wrenn went for a walk with their 13-year-old son, Bryant, in a wooded area near their residence in the Hurdle Mills community of rural Person County, North Carolina. As they were walking, the Wrenns noticed a man in "a squatting position" approximately 45 to 55 feet away. The man suddenly jumped up, picked up a shirt from the ground and fled down the path away from the Wrenns. The man was a white male, and was wearing jeans

but no shirt. The Wrenns both identified the Petitioner as strongly resembling the man they saw in the woods.

As the man went out of sight, the Wrenns discovered that he had been crouched over the lifeless body of a female, later identified as Brenda Leigh Smith. The female victim was lying face down with her head turned to the right, and her hands were bound behind her back with a brown shoestring. An autopsy showed that Brenda died as a result of ligature strangulation. In the forensic pathologist's opinion, the object used around the victim's neck to cause the ligature strangulation "was something broad."

The victim, Brenda Smith, had resided with her parents in Danville, Virginia at the time of her death and had been dating the Petitioner. Brenda worked two jobs--one at a hosiery mill and the other at a local bowling alley. Mary Smith, Brenda's mother, testified that on Saturday, October 20, 1984, soon after Brenda arrived home from working at the bowling alley, the Petitioner telephoned Brenda. Brenda told the Petitioner that she was getting ready to take her mother to the store, but that he could come over to her house. When Mrs. Smith and Brenda returned, the Petitioner was sitting on the couch. The Petitioner had been driving Brenda's car, a blue 1979 Plymouth Horizon. The Petitioner told Brenda that she did not have time to wash her hair because "they had to get on the road." Brenda thereafter changed clothes and told her mother, "Momma, we'll be back after a while. We're going to Greensboro." At approximately 2:30

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evidence relating to the hostage-taking incident at the James Hardy residence and the contemporaneous incriminating statements made by the Petitioner, Darryl Gammon was permitted to testify that while he was at his uncle's residence he heard "a little ruckus going on downstairs." He and his cousin, Irvin Hardy, along with Tony Gammon, his uncle, proceeded downstairs to investigate. In one of the downstairs rooms, they found James Hardy with his hands tied behind his back, his feet also tied, and a gag tied around his mouth. As James Hardy was being untied, the Petitioner emerged from behind a curtain with a flashlight and a knife in his hand. Darryl attempted to restrain the Petitioner with a gun until law enforcement officers could be summoned, but the Petitioner grabbed Darryl's uncle, Tony Gammon, and placed the knife to Tony's throat, threatening "he done killed two and he didn't have nothing to lose. If he killed anybody else, it didn't matter with him." With the knife still at Tony's throat, the Petitioner forced Darryl to surrender the gun or "he was going to kill [Tony] right there in front of [Darryl]." The Petitioner approached Darryl with the knife and backed him through the downstairs basement door. Darryl stepped beside the house, emptied the bullets from his gun, and placed the gun on the patio in front of the Petitioner. The Petitioner picked up the gun, noticed that it was not loaded, and again threatened to kill Tony if Darryl did not furnish him the bullets. According

to Darryl, the Petitioner did not appear to be under the influence of drugs or other intoxicants at the time.

Approximately 6:20 p.m. that evening, Deputy Vic Ingram of the Pittsylvania County Sheriff's Department arrived at the scene and found the Petitioner holding Tony Gammon hostage with a knife to his throat. The Petitioner kept the law enforcement officers at bay for approximately five and a half hours before he finally was subdued and arrested. At the time he was taken into custody, the officers searched and seized from the Petitioner a yellow gold George Washington High School class ring engraved with the name "Brenda Smith" inside, a yellow gold black onyx ring, and a Miller key ring and keys with a metal medallion engraved, "Certified Crazy Person." When the Petitioner saw Deputy Ingram, he warned Deputy Ingram to get back, "that he had already killed two people and that he didn't mind killing one more, that he didn't have anything to lose. And if [Deputy Ingram] came anywhere near him, he would kill [Deputy Ingram] too."

Betty Smith, Brenda Smith's sister, identified the rings and key chain taken from the Petitioner as having belonged to the victim.

During the hostage-taking incident at the James Hardy residence, the Petitioner made a number of incriminating statements, including statements claiming to have previously killed two people and to be good at killing with shoelaces; admitting that he went to Statesville and spent the night with

his girlfriend "the other night"; and, threatening to harm or kill his hostage.

An extensive voir dire hearing was held concerning the admissibility of evidence relating to the Petitioner's similar murder of another former girlfriend, Joan Brady, who was found dead at her residence on Friday afternoon, October 19, 1984. As a result of the trial court's rulings, Susan Pyron was permitted to testify that on Friday afternoon, October 19, 1984 she went to the residence of her sister, Joan Brady, and subsequently called the landlord to unlock Joan's apartment door. When Mrs. Pyron gained entry into the apartment's bedroom, she pulled the covers back from the bed and found Joan Brady's body. Mrs. Pyron described her sister's body as having been face down on the bed, her head turned to the right, with her hands tied behind her back with red shoestrings.

A forensic pathologist testified that Joan Brady also died as a result of ligature strangulation. The broad ligature to Joan Brady's neck was "a soft ligature," approximately seven-eighths of an inch wide.

Jerald Inman, who had been incarcerated with the Petitioner in the Danville City Jail from November of 1984 to July of 1985, testified that the Petitioner admitted killing Brenda Smith and Joan Brady. According to Inman, the Petitioner explained that he had been engaged to marry Brenda Smith, but also was dating Joan Brady and Janice Bates, as well as several other girls, and the

pressure of juggling these relationships "just got to the point where he said he had to eliminate somebody."

2. Penalty-Phase Evidence

Elaine Clay, who had testified during the guilt-phase of the trial concerning the Petitioner's attempt to move in with her and her having seen the Petitioner in Danville on Sunday afternoon, October 21, 1984, was recalled by the State as its first witness at the penalty phase. Ms. Clay, who lived in Pelham, North Carolina, approximately fifteen miles from where she saw the Petitioner that Sunday on Westover Drive in Danville, testified that she and her nine-year-old son were awakened during the early morning hours of October 22, 1984 by the sound of a smoke detector in her house. When they noticed smoke coming from under the basement door, Ms. Clay and her son evacuated the house and drove to the home of a nearby neighbor who called the fire department. The house sustained some structural damage from the fire, including the floor joists below her bedroom.

Investigators determined that the fire's point of origin was a pile of boxes in the basement of Ms. Clay's house, under which was found a partially melted plastic antifreeze container. According to the State's expert, the fire had been set intentionally, not accidentally.

During the hostage-taking incident, the Petitioner made statements indicating that a friend had burned Elaine Clay's house, which he acknowledged was occupied at the time. The

Petitioner referred to Ms. Clay as being "an ugly bitch" and stated that "he should have just killed her himself." In a conflicting statement, the Petitioner was overheard stating he had burned Ms. Clay's house to the ground, and that her little boy was in the house with her at the time. At one point during the hostage negotiations the Petitioner poured the contents of a butane cigarette lighter over his hostage and unsuccessfully attempted to ignite it.

Before resting its case-in-chief at the sentencing phase, the State introduced a judgment from Virginia showing that the Petitioner had been convicted of the Joan Brady murder on May 2, 1985 and received a life sentence.

The first witness for the Petitioner at sentencing was his mother, Cleo Price, who testified regarding his childhood, academic performance, drug use, and hospitalizations for psychological treatment.

The Petitioner took the stand and testified that his early school years were relatively unremarkable. According to the Petitioner, he "made pretty good grades." When he reached the seventh grade, he began "hanging around with [people who] smoked dope and different things." He was "about fifteen years old" when he first was placed in a mental institution. He had stolen a car, and had become disobedient to others, including his parents. During his stay at Dorothea Dix Hospital, he was placed in a management ward and strapped to a bed. He stayed at Dix for

approximately sixteen months and then was hospitalized at the John Umstead Hospital in Butner. Each of his commitments at Butner lasted four to six months. He escaped from Butner during one of his commitments there.

As a result of further legal difficulties, the Petitioner was hospitalized at the Southwestern State Hospital in Marion, Virginia, where he remained for approximately nine months. Because of his disruptiveness during this commitment, he was given a number of physical examinations and tests.

About a month after his last hospitalization, the Petitioner got a job at the mill and bought a car. He moved out of his parents' home and began living with various women. He admitted that he was dating Brenda Smith while he was living with Joan Brady. He also admitted to having been with Brenda on the Saturday and Sunday morning before she died. According to the Petitioner, he had taken LSD that weekend. He last saw Brenda when he allegedly took her to work at the bowling alley in Danville.

On cross-examination, the Petitioner admitted that i
January of 1985, while he was in the Danville City Jail for th
hostage-taking charges and the murder of Joan Brady, he caus
eight jailers to be hospitalized. The Petitioner also admitt
making threats to the psychiatrist who examined him in January
1985. The Petitioner acknowledged his handwriting of a letter
one "Carolyn Johnson" threatening to kill her. The Petiti

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crazy so that he would not go to jail or the electric chair." Dr. Centor felt that the Petitioner was "malingering mental illness" in order to avoid a possible death sentence in North Carolina and also the Virginia charges relating to the hostage-taking. Two other psychiatrists concurred in Dr. Centor's opinion.

Dr. Selwyn Rose, a forensic psychiatrist, also testified as an expert witness for the Petitioner. Dr. Rose disagreed with Dr. Centor's conclusion that the Petitioner was malingering. He explained that the Petitioner had a history of mental illness and that everyone "who has seen this man thought he was psychotic except for Dr. Centor." According to Dr. Rose, the Petitioner has a variety of mental illnesses, which probably increase with his drug-taking. Although a specific diagnosis was difficult, Dr. Rose stated that the Petitioner suffers from "personality disturbances which are quite profound." Dr. Rose agreed that all of the Petitioner's symptoms could be explained with a diagnosis of "mixed personality disorder plus alcohol and substance abuse." Dr. Rose also concurred that the Petitioner had a long-standing adjustment problem; that he had exaggerated his psychiatric symptoms; that he did not suffer from schizophrenia; and that the two major explanations of his mental disorder were an intermittent affective disorder and alcohol and substance abuse. Dr. Rose added that the Petitioner's mental retardation also was a major part of the explanation.

In Dr. Rose's opinion, the Petitioner's mental condition would have impaired his ability to make judgments and control his impulses in October of 1984. The Petitioner's drug abuse, combined with his mental illness and limited intellectual capacity, impaired his ability to make judgments, rational decisions, and control his impulses. The Petitioner suffered from "a very impaired control system" because of his mental illness and history of drug abuse.

On cross-examination, Dr. Rose admitted that the Petitioner had not been completely candid with him, perhaps had lied on occasions, and had exaggerated his mental illness. Dr. Rose conceded that the Petitioner was potentially dangerous when not taking medication.

The Petitioner did indicate to Dr. Rose that he was present when both Joan Brady and Brenda Smith were murdered. Following some minor arguments, the Petitioner slapped Joan twice and she threatened to have him locked up. She then hit his head on the door. He pushed or grabbed her, and threw her onto the bed. She was then strangled, and he tied her hands behind her back after she was dead.

The Petitioner told Dr. Rose that he and Brenda Smith had stopped on the side of the road to find a place to have sex. After they had made love, she wanted something to drink and so they went to a gas station where she called her mother. Following an argument, Brenda came back to the car and was crying. The

Petitioner grabbed her and "played too rough." He stated, "she was lying there dead, I didn't know what to tell her about being married."

REASONS THE WRIT SHOULD NOT ISSUE

I. THE EIGHTH AMENDMENT DOES NOT REQUIRE THAT A CAPITAL DEFENDANT BE PERMITTED TO ARGUE THE SENTENCING JUDGE'S ABILITY TO IMPOSE CONSECUTIVE LIFE SENTENCES SINCE SUCH A FACTOR IS IRRELEVANT TO THE DEFENDANT'S CHARACTER AND RECORD, OR TO THE CIRCUMSTANCES OF HIS OFFENSE.

The Petitioner contends that the trial court's action precluding his defense counsel from arguing to the sentencing jury the potential imposition of consecutive life sentences violated the Eighth Amendment. According to the Petitioner, informing the jurors that the sentencing judge was empowered to impose a life sentence consecutive to another he already was serving would have had mitigating value for a sentence less than death. Therefore, even though such evidence did not relate to either the Petitioner's culpability for the crime or the circumstances of its commission, he believes he should have been allowed to present such evidence under the guise of his constitutional right to put before the jury "any relevant mitigating evidence," citing Lockett v. Ohio, 438 U.S. 586 (1978) and its progeny, including Skipper v. South Carolina, 476 U.S. 1, 4 (1986), quoting, Eddings v. Oklahoma, 455 U.S. 104, 110 (1982), and Penry v. Lynaugh, 492 U.S. 302 (1989). The Petitioner also

maintains that based on Gardner v. Florida, 430 U.S. 349, 362 (1977) (plurality held that defendant was denied due process when the death penalty was imposed, at least in part, on the basis of confidential information which was not disclosed to the defendant or his counsel), he was entitled to argue evidence of the life sentence in response to the State's proffered aggravating circumstance that he previously had been convicted of the Joan Brady murder.[2] On appeal, the North Carolina Supreme Court rejected this claim, holding that such evidence is constitutionally irrelevant to a capital sentencing decision under California v. Ramos, 463 U.S. 992, 1013 n. 30 (1983) ("[many] state courts have held it improper for the jury to consider or to be informed (through argument or instruction) of the possibility of commutation, pardon or parole."). State v. Price, 326 N.C. at 84, 388 S.E.2d at 99-100, reaff'd in, 331 N.C. at 634-35, 418 S.E.2d at 177; (P.App. 16-17, 38). Unable to show that this holding is in conflict with any other state or federal court decisions, the Petitioner resorts to accusing the North Carolina Supreme Court

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2 The due process argument based on Gardner was not seriously developed or argued by the Petitioner on direct appeal to the North Carolina Supreme Court. (R.App. 1-12) Although the Petitioner cited Gardner, his argument focused on (1) whether he should have been entitled to argue the potential imposition of a consecutive life sentence under N.C.Gen.Stat. §84-14 (1985), and (2) whether he had an Eighth Amendment right under Lockett to present and argue such a matter in mitigation. The Petitioner made no specific due process argument under this assignment of error, and the North Carolina Supreme Court did not address such an argument in holding that the effect of consecutive life sentences is irrelevant to a jury's death penalty decision.

of perfunctorily rejecting his claim under "an apparent misunderstanding of Lockett and its progeny." (PWC at 22) However, it is he who strains the limits of Eighth Amendment jurisprudence with this claim.

Before resting its case at the sentencing phase, the State introduced into evidence a Virginia judgment showing that the Petitioner previously had been convicted of the murder of Joan Brady, for which he received a life sentence. The record shows that during the charge conference at the sentencing phase of the trial, defense counsel requested the trial court to submit as one of the mitigating circumstances that the Petitioner previously had received a life sentence, and the trial court could impose an additional life sentence to commence at the expiration of that life sentence which "provides additional protection to society." (P.App. 87) When the trial court inquired if such a mitigating circumstance had been approved by any court, defense counsel replied, "No, sir, we have no authority for that." (P.App. 88-89) The trial court then sustained the State's objection to the proposal. (P.App. 89)

After preliminary sentencing phase arguments, the trial court entered a ruling on the Petitioner's motion to prohibit the prosecutors from arguing the general deterrence of the death penalty. Noting that the first prosecutor had made no reference to general deterrence in his argument, the trial court ordered that the second prosecutor also "not argue at any time before the

jury any theory of general deterrence in connection with the death penalty." (R.App. 13-14) The trial court also prohibited defense counsel from arguing "anything concerning the possibility of parole, the possibility of any other governmental agency taking steps in connection with the sentencing proceeding." (R.App. 14) The State requested that defense counsel further be cautioned not to argue the Petitioner would "spend the rest of his life in prison providing necessary prevention." (R.App. 14) Defense counsel thereafter inquired if the Petitioner was prohibited from making reference to the fact he already was facing a life sentence. (R.App. 14) After reviewing the case law, the trial court ruled that defense counsel could not mislead the jury as to the effect of a life sentence, but that defense counsel could "argue to the jury that the defendant has received a life sentence in Virginia." (R.App. 15) Defense counsel then tendered, for the record, that his argument "would be that the Court has it within its power and discretion to impose a life sentence which would run at the end of the life sentence which the defendant is serving in the State of Virginia." (R.App. 15-16) The trial court clarified that defense counsel "may not argue that to the jury." (R.App. 16) During his closing argument to the jury, however, one of the defense counsel did argue, "I'm not asking you to forgive him. I'm not asking that for a minute. He's already serving a life sentence." (R.App. 17)

As the North Carolina Supreme Court properly held on direct appeal, the trial court's rulings did not prevent the Petitioner from offering relevant mitigating evidence for the sentencing jury's consideration in violation of Lockett and its progeny. The prospect that the Petitioner might face two, consecutive life sentences simply was irrelevant to his character and record, or to the circumstances of his crime.

> That defendant is currently serving a life sentence for another unrelated crime is not a circumstance which tends to justify a sentence less than death for the capital crime for which defendant is being sentenced. Although the sentence comprises part of his formal criminal record and was offered against defendant by the State in the sentencing hearing, "the additional protection to society" possibly achieved by his incarceration under that sentence is not an aspect of defendant's record.

State v. Price, 331 N.C. at 634-35, 418 S.E.2d at 177; (P.App. 38). In California v. Ramos, a majority of this Court specifically refused to override the states providing that capital sentencing juries should not be permitted to consider commutation power. As even the late Justice Marshall emphasized in his Ramos dissent, the "possibility [of eventual release through commutation and parole] bears no relation to the defendant's character or the nature of the crime, or to any generally accepted justification for the death penalty." California v. Ramos, 463 U.S. at 1021 (Marshall, J., dissenting).

Therefore, the Petitioner is incorrect in asserting that no evidence may be deemed irrelevant as possible mitigation.

The Petitioner can point to no state or federal decisions holding that the Eighth Amendment requires the admission of evidence and argument on a sentencing judge's ability to impose consecutive life sentences. Indeed, as this Court noted in footnote 30 of California v. Ramos, 463 U.S. at 1013 n. 30, the propriety of such evidence and argument has been left to the state courts as a matter of state law. The North Carolina Supreme Court correctly recognized this principle in the instant case: "In other words, the Constitution permits such argument or instruction, but it is not constitutionally required." State v. Price, 326 N.C. at 84, 388 S.E.2d at 100 (emphasis original) (P.App. 17), citing, State v. Robbins, 319 N.C. 465, 519, 356 S.E.2d 279, 311, cert. denied, 484 U.S. 918 (1987). As a matter of state law, North Carolina deems that "[a]rgument concerning the effect of consecutive life sentences upon the period of a defendant's incarceration is . . . irrelevant to a determination of his sentence." State v. Price, 326 N.C. at 84, 388 S.E.2d at 100; (P.App. 17). Its decision is of no federal constitutional concern. The Petitioner also has failed to show that the North Carolina Supreme Court's decision is in conflict with other federal or state jurisdictions on this issue.

PUBLISHER'S NOTE:

Page(s) 23 missing in original.

impermissibly coerce the jury to return a death sentence. Lowenfield v. Phelps, 484 U.S. at 237-41.

The Petitioner argues that the trial court's supplemental instructions asking his jury to continue its sentencing deliberations, without explaining the consequences of the jury's inability to render a unanimous recommendation, improperly coerced dissenting jurors to surrender their convictions as to the appropriateness of a life sentence. The North Carolina Supreme Court rejected this claim, holding that in context the trial court only informed the jurors that whatever recommendation they did make had to be unanimous, and that the trial court did not imply that a recommendation must be reached. State v. Price, 326 N.C. at 90-96, 388 S.E.2d at 103-05; (P.App. 20-22). Moreover, the trial court deliberately and carefully stated that it was in no way trying to force the jurors to reach a recommendation and urged them to reconcile their differences only if they could do so without surrendering their conscientious convictions. State v. Price, 326 N.C. at 95-96, 388 S.E.2d at 104-05; (P.App. 21-22). The North Carolina Supreme Court's decision on this issue is consistent with Lowenfield and does not warrant review on certiorari.

At 2:57 p.m. on the afternoon of Wednesday, September 23, 1984, the "Issues and Recommendation as to Punishment" form was delivered to the jury and the jury retired for its sentencing deliberations. At 5:00 p.m., the jury was summoned back to the

courtroom and the trial court interrupted the jury's deliberations for an overnight recess. The jury resumed its sentencing deliberations the next morning at 9:33 a.m., Thursday, September 24, 1987. (P.App. 90) At 11:12 a.m., after three hours and 42 minutes of deliberating, there was a knock on the jury room door and the jury returned to the courtroom. (P.App. 90) The foreman informed the trial court that the jury had not yet reached a recommendation. (P.App. 91) When the trial court inquired if the jury had a question, the foreman replied, "Not that I know of." (P.App. 91) The trial court then asked if the foreman wished to address the court, and the following colloquy transpired:

> THE FOREMAN: Two of the members of the jury stated that--
>
> THE COURT: Now--now, don't tell me what anyone stated.
>
> THE FOREMAN: Okay. We're hung.

(P.App. 91) Out of the presence of the jury, the trial court denied defense counsel's motion to impose a life sentence pursuant to N.C.Gen.Stat. §15A-2000(b) (1983), ruling that the jury should be allowed additional time for deliberations. (P.App. 91-93) However, upon request by defense counsel, the trial court agreed to instruct that the individual jurors should not surrender their own convictions solely in order to reach a verdict. (P.App. 94) The trial court then gave the jury further instructions pursuant to N.C.Gen.Stat. §15A-1235 (1988),

including defense counsel's requested charge on not surrendering one's own convictions in order to reach a unanimous recommendation:

> THE COURT: Members of the jury, I am going to ask that you resume your deliberations in an **attempt** to return a recommendation. I have already instructed you that your recommendation must be unanimous, that is, each of you must agree on the recommendation. I shall give you these additional instructions.
>
> First, it is your duty to consult with one another and to deliberate with a view to reaching a recommendation if it can be done without violence to individual judgment.
>
> Second, each of you must decide the case and your recommendation for yourself, but only after an impartial consideration of the evidence with your fellow jurors.
>
> Third, in the course of your deliberations you should not hesitate to reexamine your own views and change your opinion if you become convinced it is erroneous. On the other hand, you should not hesitate to hold to your own views and opinions if you remain convinced they are correct.
>
> Fourth, none of you should surrender an honest conviction as to the weight or effect of the evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a recommendation.
>
> Please be mindful that I am in no way trying to force or coerce you to reach a recommendation. I recognize the fact that there are sometimes reasons why jurors cannot agree. Through these additional instructions I have just given you, I merely want to emphasize that it is your duty to do whatever you can to reason the matter over together as reasonable people and to reconcile your differences if such is possible without the surrender of conscientious conviction to reach a recommendation.
>
> I will now let you resume your deliberations.

(P.App. 95-96) (emphasis added) At 11:47 a.m., the jury retired to continue its deliberations, and at 12:45 p.m. returned to the courtroom with its recommendation that the Petitioner be sentenced to death. (P.App. 107-110)

The Petitioner claims that the trial court's instructions improperly coerced the jury's death verdict because, unlike in Lowenfield, the trial court failed to inform the jury that a life sentence would be imposed if the jury still was unable to agree on a unanimous recommendation. However, the Petitioner did not request such an instruction at the time, arguing instead that the trial court simply should impose a life sentence pursuant to N.C.Gen.Stat. §15A-2000(b) (1988). (P.App. 93) Moreover, he made no objection to the absence of such an instruction, and sought no correction of the instructions actually given. As in Lowenfield, "such an omission indicates that the potential for coercion argued now was not apparent to one on the spot." Lowenfield v. Phelps, 484 U.S. at 240.

The instructions given by the trial court were a correct statement of the law, and could not reasonably have been misunderstood by the jury. Since the jury did not ask what would happen in the event of a failure to reach a unanimous verdict, the North Carolina Supreme Court properly held that the trial court here was not required to give the instruction recommended in State v. Smith, 320 N.C. 404, 422, 358 S.E.2d 329, 339 (1987) (upon inquiry by the jury as to the requirement of unanimity, the

trial court must inform the jurors that their inability to reach a unanimous verdict should not be their concern but should simply be reported to the court). State v. Price, 326 N.C. at 91-92, 388 S.E.2d at 104-05; (P.App. 21-22). Moreover, any possible misunderstanding or coercive effect that might have resulted from the trial court's instructions was ameliorated by the cautionary admonitions at the end of the supplemental charge. As emphasized above, the trial court admonished the jurors that it "in no way [was] trying to force or coerce" them into reaching a recommendation, and expressly stated that there may be occasions when jurors simply cannot agree. "The effect of this instruction was to make clear to the jurors that they were free to disagree." State v. Huff, 325 N.C. 1, 67, 381 S.E.2d 635, 673 (1989), vacated and remanded on other grounds sub nom., Huff v. North Carolina, 497 U.S. 1021 (1990), remanded for resentencing in, State v. Huff, 328 N.C. 532, 402 S.E.2d 577 (1991). These last words that the jury heard, along with the language that none of the jurors should surrender their honest convictions, must have been understood as authorizing the jury to return with a non-unanimous verdict if they still could not agree after further deliberations.

Such curative instructions distinguish the instant case from the other states' decisions cited by the Petitioner in support of granting review. (PWC at 34-37) For example, in State v. Williams, 392 So.2d 619, 633-35 (La. 1990), which the Petitioner

cites, the jury foreman specifically inquired if the jury's decision had to be unanimous, to which the trial court responded affirmatively. Here, in contrast, the foreman only indicated difficulty reaching a decision. "The instructions were not prompted by a question concerned with the requisite of unanimity." State v. Price, 326 N.C. at 92, 388 S.E.2d at 104; (P.App. 21). More importantly, the trial court did not imply that a recommendation must be reached, and urged the jurors to reconcile their differences only if they could do so without surrendering their conscientious convictions. State v. Price, 326 N.C. at 92, 388 S.E.2d at 104-05; (P.App. 21-22).

Given the content and context of the trial court's supplemental instructions, the Petitioner's case is not in true conflict with other jurisdictions. Accordingly, under these circumstances, the supplemental instructions here did not coerce the jury's sentencing recommendation, and do not warrant review on certiorari.

III. SINCE THE INDIVIDUAL MEMBERS OF THE JURY AFFIRMED THEIR ANSWERS, EITHER UNANIMOUSLY FINDING OR UNANIMOUSLY REJECTING THE MITIGATING CIRCUMSTANCES SUBMITTED, THE ERROR IN THE UNANIMITY REQUIREMENT UNDER MCKOY V. NORTH CAROLINA, 494 U.S. 433 (1990) WAS HARMLESS BEYOND A REASONABLE DOUBT AND DOES NOT WARRANT REVIEW ON CERTIORARI.

The Petitioner argues that the trial court's sentencing instructions, directing the jury to consider only mitigating circumstances found unanimously, improperly limited the jury's

consideration of possible mitigation in violation of the intervening decision by this Court in McKoy v. North Carolina, 494 U.S. 433 (1990). In McKoy, a majority of this Court held that, under Mills v. Maryland, 486 U.S. 367 (1988), North Carolina's express unanimity requirement for the finding of mitigating circumstances unconstitutionally limits the sentencing jury's ability to consider mitigating evidence. On remand, the North Carolina Supreme Court unanimously held that the McKoy error in the Petitioner's case was harmless beyond a reasonable doubt because the trial court's polling of each individual juror showed that the jury was unanimous in rejecting the non-found mitigating circumstances. State v. Price, 331 N.C. at 623-28, 418 S.E.2d at 171-74; (P.App. 32-35). The Petitioner now contends that certiorari review is warranted because the North Carolina Supreme Court "applied an incorrect harmless error analysis given the fundamental nature of the constitutional error in this capital case." (PWC at 38) According to the Petitioner, a reasonable juror may have understood the polling inquiry to be whether his answer was "No" because the jury as a whole was not unanimous as to the existence of a particular mitigating circumstance, and therefore the polling process did not prove the absence of McKoy error or that any such error was harmless. However, unlike McKoy, here the record clearly shows that the sentencing jury unanimously did reject all but one of the

mitigating factors submitted for its consideration, and therefore the McKoy error properly was held to be harmless.

In Mills, both the majority and the dissent accepted as constitutional a system which requires unanimity both to accept and reject factors in mitigation. Writing for the majority in Mills, Justice Blackmun observed: "[i]f the jury understood the verdict form as the [Maryland] Court of Appeals asserted it should have, then every time it marked 'no' beside a mitigating circumstance it indicated its unanimous conclusion that petitioner had not proved the relevant facts by a preponderance of the evidence, and thus the court properly upheld the judgment." Mills v. Maryland, 486 U.S. at 376. The majority concluded that the sentencing instructions and the verdict form together could not, with any degree of certainty, be read to reach this saving construction "that the 'no' answer, like the 'yes' answer, must be unanimous." Mills v. Maryland, 486 U.S. at 377-78. There was no "extrinsic evidence of what the jury in this case actually thought." Mills v. Maryland, 486 U.S. at 381. See also McKoy v. North Carolina, 494 U.S. at 455 n. * ("It is no surprise that the majority in Mills assumed such a scheme [requiring jury unanimity for presence or absence of a mitigating factor] would be constitutional.") (Kennedy, J., concurring); McKoy v. North Carolina, 494 U.S. at 459 n. 1 (Scalia, J., dissenting).

Here, contrary to the Petitioner's argument, there is "extrinsic evidence" that the jury did unanimously reject all but

one of the mitigating circumstances submitted for its consideration. When the jury returned with its sentencing recommendation in open court (P.App. 107-10), the trial court allowed defense counsel's request that the jurors be polled on each of the questions answered on the Issues and Recommendations form, including the individual juror's answers to the 10 mitigating factors. (P.App. 110-12) During the subsequent polling of the jury, each of the 12 jurors indicated unanimous rejection of all but the sole mitigating factor that the Petitioner's family has a history of mental illness or emotional disturbance (mitigating factor no. 9). (P.App. 112-18) (T Vol. VII pp 2090-2153) There was absolutely no evidence of any disagreement among the individual jurors as to the existence or non-existence of the mitigating factors, despite the opportunity during the polling procedure for the expression of such dissent.

The North Carolina Supreme Court expressly rejected the Petitioner's contention that a reasonable juror might have understood the polling to refer to the jury's answers as a whole, rather than whether he or she individually assented to the answers as announced or wished to change his or her answers.

> A reasonable juror would understand that if she were being questioned individually, the question was referring to her as an individual juror. The very purpose of the poll is to ascertain each juror's individual vote on the issue or issues in question. We are confident the jurors here did not understand it to be otherwise.

These facts raise a spectre of coercion from the supplemental instructions. Once the trial court had given these supplemental instructions, the jury deliberated for just over three-fourths of an hour before returning a recommendation of death. The jury's returning with its sentencing recommendation "soon after receiving the supplemental instruction . . . suggests the possibility of coercion." *Lowenfield*, 484 U.S. at 240; *United States v. United States Gypsum Company*, 438 U.S. 422, 462 (1978). A critical distinction exists, however, between the challenged instruction below and the one given in *Lowenfield*.[7] In *Lowenfield*, the trial court began its supplemental instruction by explaining, "As I instructed you earlier if the jury is unable to unanimously agree on a recommendation the Court shall impose the sentence of Life Imprisonment . . . ." *Id.* at 235. Thus, the jury in *Lowenfield*, unlike petitioner's jury, not only knew the effect of a deadlock but also realized *it was permissible* to fail to reach a unanimous sentencing recommendation. The trial court never told petitioner's jury it could fail to reach a unanimous sentencing recommendation, that the jury could "hang." Despite finding the supplemental instruction in Lowenfield not coercive, this Court recognized the potential problem. It limited the scope of *Lowenfield* as follows:

> By so holding we do not be understood as saying other combinations of supplemental charges and polling may not require a different conclusion. Any criminal defendant, and especially any capital defendant, being tried by a jury is entitled to the uncoerced verdict of that body.

Id. at 241. The court below rejected this argument on the merits. [App. 22] *Price*, 326 N.C. at 90-93, 388 S.E.2d at 103-05. The court essentially deferred to the trial court's discretion as to whether supplemental instructions were appropriate. *Id.* at 92-93, 388

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[7] Furthermore, defense counsel in *Lowenfield* failed to object to the supplemental instruction, unlike the present case. *Lowenfield v. Phelps*, 484 U.S. 231, 240 (1988). This Court found "such an omission indicate[d] that the potential for coercion argued now was not apparent to one on the spot." *Id.* On the contrary, the "potential for coercion" was readily apparent to those "on the spot" in the present case.

room. This question referred "to the present in-court state of mind of the juror and serve[ed] only to emphasize by repetition that the crucial assent is the juror's assent to the verdict when he returns to the courtroom." State v. Asbury, 291 N.C. 164, 170, 229 S.E.2d 175, 178 (1976). By the clerk asking if the juror continued to assent to each of the negative findings of the nine mitigating circumstances, the juror would have understood such questioning to be whether he or she, individually, agreed with the answer or wished to express a different one. In assenting, the juror, in effect, was stating for the record that he or she, individually, found and agreed that the Petitioner had failed to prove by a preponderance of the evidence the nine rejected mitigating circumstances.

The Petitioner similarly ignores the import of the trial court's notation on the record following the polling procedure. After all 12 of the jurors had been polled, the trial court stated:

> Let the record reflect that the clerk has individually polled each juror at which time each juror in a positive manner stated that this was his or her answer to each of the issues and the recommendation of death and that he or she still assents thereto. The polling being unanimous, the Court orders that the issues and recommendation as to punishment form be recorded by the clerk.

(R.App. 18-19) (emphasis added) Clearly, the trial court made it a matter of record that the polling procedure had afforded the jurors the opportunity to confirm their personal answers to the

sentencing issues and recommendation, including the non-found mitigating circumstances, but none had expressed any individual disagreement with the jury's answers as recorded on the Issues form and announced in open court. Therefore, as the North Carolina Supreme Court held, all facets of the polling procedure reinforced the reasonable belief by the jurors that the questions and answers were directed to them as individuals jurors--not the entire jury.

In addition to the Petitioner's case, the North Carolina Supreme Court has found similar jury polling to render McKoy error harmless in two other cases, State v. Allen, 331 N.C. 746, 747, 417 S.E.2d 227, 227 (1992), cert. denied, ___ U.S. ___, 113 S.Ct. 1402, reh'g denied, ___ U.S. ___, 113 S.Ct. 1885 (1993); and, State v. Laws, 328 N.C. 550, 554-56, 402 S.E.2d 573, 576-77, cert. denied, ___ U.S. ___, 112 S.Ct. 216, reh'g denied, ___ U.S. ___, 112 S.Ct. 627 (1991). But see State v. Lloyd, 329 N.C. 662, 665-68, 407 S.E.2d 218, 220-22 (1991) (distinguishing Laws on bases that individual jurors were polled only as to the final sentencing decision and polling questions did not reveal whether jury's rejection of the mitigating circumstances was unanimous). As the North Carolina Supreme Court suggested in State v. McKoy, 327 N.C. 31, 44 n. 4, 394 S.E.2d 426, 433 n. 4 (1990), McKoy error also has been found to be harmless in two other categories of cases: (1) where the defendant offered no mitigating evidence at sentencing, and none of the evidence presented would have

supported the finding of a mitigating circumstance, State v. Hunt, 330 N.C. 501, 515-17, 411 S.E.2d 806, 813-14, cert. denied, ___ U.S. ___, 112 S.Ct. 3045 (1992); and, (2) where the jury found all of the mitigating circumstances submitted, State v. Roper, 328 N.C. 337, 368-70, 402 S.E.2d 600, 618-19, cert. denied, ___ U.S. ___, 112 S.Ct. 280 (1991).

For the first time in any court, brief, or petition, the Petitioner now suggests that certiorari is warranted on the issue of whether McKoy error ever may be harmless, citing this Court's analytical framework of "trial" and "structural" errors identified in Arizona v. Fulminante, 499 U.S. ___, ___, 111 S.Ct. 1246, 1265 (1991).[4] However, "[o]rdinarily, this Court does not decide questions not raised or resolved in the lower court." Youakim v. Miller, 425 U.S. 231, 234 (1976) (per curiam), quoted in, Taylor v. Freeland & Kronz, ___ U.S. ___, ___, 112 S.Ct. 1644, 1649 (1992). See also Berkemer v. McCarty, 468 U.S. 420, 443 (1984)

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4 The Petitioner has not questioned the availability of harmless error analysis in any of the following: in briefing or at argument on his initial direct appeal of the Mills/McKoy issue to the North Carolina Supreme Court, (R.App. 20-21); in his first certiorari petition to this Court, Price v. North Carolina, No. 90-5045 (PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA, filed June 27, 1990, at 11-13), or in his reply brief, (REPLY TO BRIEF IN OPPOSITION, filed Sept. 19, 1990, at 2-5); in his supplemental briefing or at argument on remand to the North Carolina Supreme Court for further consideration in light of McKoy, (R.App. 22-44); or, in his second certiorari petition to this Court, Price v. North Carolina, No. 92-6239 (PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA, filed Oct. 13, 1992, at 37-45), or in his reply brief, (REPLY TO BRIEF IN OPPOSITION, filed Dec. 29, 1992).

Although the decisions from other jurisdictions on this issue are not unanimous, *e.g., People v. Kimble*, 44 Cal. 3rd 4809, 244 Cal. Rptr. 148, 749 P.2d 803 (1988); *Romine v. State*, 256 Ga. 521, 250 S.E.2d 446 (1986), the weight of authority supports petitioner's position. The division among the states demonstrates, at the very least, the need for this Court's intervention in this important issue. The potentially coercive effect of an *Allen*-type charge in the sentencing phase of a capital case recognized in *Lowenfield* is a risk the Eighth Amendment will not permit. If a single juror agreed to the sentencing recommendation reached here because of the erroneous impression that unanimity was required, that juror was the difference between life and death for petitioner. In a case of jury deadlock, the exacting standard of reliability demanded in capital sentencing proceedings offsets any concern the state might have with juror abdication. Given the division of authority among the highest courts of a number of jurisdictions on this important issue to capital proceedings, review of this question is in order.

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if given the chance, take the easy way out and fail even to try to reach agreement" as to a sentencing recommendation.

> The process of death qualification, the jurors' oath, and the trial court's instructions are all designed to assure that the jury will make a conscientious attempt to follow the law in reaching its verdict. The entire system of capital punishment depends on the belief that a jury representing the conscience of the community will responsibly exercise its guided discretion in deciding who shall live and who shall die. To hide from the jury the full range of its sentencing options, thus permitting its decision to be based on uninformed and possible inaccurate speculation, is to mock the goals of rationality and consistency required by modern death penalty jurisprudence.

Id. Indeed, North Carolina's Chief Justice long ago reached a similar conclusion. "I believe the instruction would inform the jury that it cannot escape the task of recommending a sentence. Whatever it does some sentence will be imposed as a result." *State v. Johnson*, 298 N.C. 355, 378, 259 S.E.2d 752, 766 (1979) (Exum, J., dissenting). Unfortunately, the court below does not follow this advice.

Court's judgment in State v. Allen, 331 N.C. at 747, 417 S.E.2d at 227. Allen v. North Carolina, ___ U.S. ___, 113 S.Ct. 1402 (certiorari denied, but Justices Blackmun, O'Connor, and Souter would have granted petition and reversed the judgment), reh'g denied, ___ U.S. ___, 113 S.Ct. 1885 (1993). However, none of the three Justices indicated which of the three issues presented in the certiorari petition in Allen v. North Carolina, No. 92-6584 (PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA, filed Nov. 12, 1992), prompted their dissent from the Court's denial of certiorari. Therefore, in view of the unanimous prior denial of certiorari in Hunt v. North Carolina on this very issue, it is disingenuous for the Petitioner to insinuate that review somehow is now more likely or appropriate in light of the dissenters from the denial of certiorari in Allen v. North Carolina.

Although Clemons v. Mississippi, 494 U.S. 738 (1990) dealt with whether a death sentence based, in part, on invalid or improperly defined aggravating circumstances nevertheless could be upheld if the error was harmless beyond a reasonable doubt, the same harmless error analysis applies equally to sentencing instructions which restrict the consideration of mitigation evidence or mitigating circumstances. Indeed, four Justices, including Justice O'Connor, previously have expressed the view, in their dissent from the remand of a North Carolina case for reconsideration in light of McKoy, that McKoy error is subject to

harmless error analysis. McNeil v. North Carolina, 494 U.S. 1050 (1990) (Kennedy, J., dissenting, and joined by Chief Justice Rehnquist, Justice O'Connor, and Justice Scalia) (issue whether unanimity requirement "may have been harmless due to failure to present mitigating evidence" remained open for examination on remand) (emphasis added). This Court also alluded to the availability of harmless error where sentencing instructions improperly precluded the jury from considering non-statutory mitigating circumstances. Hitchcock v. Dugger, 481 U.S. 393, 399 (1987) (failure to consider non-statutory mitigating circumstances warranted reversal, in part, because government "made no attempt to argue that this error was harmless"). See e.g., Demps v. Dugger, 874 F.2d 1385, 1388 n. 12 (11th Cir. 1989) (harmless error analysis is appropriate for Hitchcock violation), cert. denied, 494 U.S. 1090 (1990).

Therefore, it is not surprising that the North Carolina Supreme Court has held McKoy error to be amenable to harmless error analysis. As Chief Justice Rehnquist recently observed, "[t]here is a 'strong presumption' that any error will fall into [the category of trial errors which may be quantitatively assessed and are amenable to harmless error analysis]." Sullivan v. Louisiana, 508 U.S. ___, ___, 113 S.Ct. 2078, 2083 (1993) (Rehnquist, C.J., concurring), quoting, Rose v. Clark, 478 U.S. 570, 579 (1986). "Thus, it is the rare case in which a constitutional violation will not be subject to harmless-error analy-

sis." Sullivan v. Louisiana, 508 U.S. at ___, 113 S.Ct. at 2083, citing, Arizona v. Fulminante, 499 U.S. at ___, 111 S.Ct. at 1254, 1263-64 (listing examples of trial and structural errors). As this Court has intimated, and the lower court consistently have held, McKoy error is amenable to harmless error analysis since it epitomizes classic "trial error," which quantitatively may be assessed in the context of other mitigating evidence presented in order to determine whether the possible exclusion of mitigating circumstances by the unanimity requirement was harmless beyond a reasonable doubt.

In essence, McKoy error hypothetically precludes individual jurors from considering and giving effect to mitigating circumstances not unanimously found by the jury. See Satterwhite v. Texas, 486 U.S. 249 (1988) (harmless error rule applied to admission of evidence at the sentencing stage of capital case in violation of Sixth Amendment counsel clause). Since the Eighth Amendment does not require that a jury even make the factual findings necessary for imposing the death penalty, see Cabana v. Bullock, 474 U.S. 376 (1986), it follows that an appellate court should be free to make the harmless error determination whether the McKoy error would not have influenced the sentencing jury to recommend life.

In contrast, McKoy error is markedly different from "structural defects" which have been held not subject to harmless error analysis because they affect "the framework within which the

trial proceeds, rather than simply an error in the trial process itself." Arizona v. Fulminante, 499 U.S. at ___, 111 S.Ct. at 1263-64, citing, Gideon v. Wainwright, 372 U.S. 335 (1963) (total deprivation of right to counsel), Tumey v. Ohio, 273 U.S. 510 (1927) (judge who was not impartial), Vasquez v. Hillery, 474 U.S. 254 (1986) (unlawful exclusion of members of the defendant's race from grand jury), McKaskle v. Wiggins, 465 U.S. 168 (1984) (right to self-representation at trial), and, Waller v. Georgia, 467 U.S. 39 (1984) (right to public trial). Likewise, the Petitioner's reliance on Gray v. Mississippi, 481 U.S. 648 (1987), in which this Court held that harmless error analysis is not applicable to the improper excusal for cause of a juror for opposition to the death penalty, is misplaced since "the impartiality of the adjudicator goes to the very integrity of the legal system." Gray v. Mississippi, 481 U.S. at 668. McKoy error is not "so basic to a fair trial [or sentencing] that [it] can never be treated as harmless error." Chapman v. California, 386 U.S. 18, 23 (1967).

Under these circumstances, the Petitioner's McKoy claim is unique to the facts of his case and does not present any important federal questions worthy of this Court's attention. The result reached by the North Carolina Supreme Court on this issue does not conflict with this Court's harmless error cases, or any lower courts. Accordingly, this Court should not issue its writ of certiorari.

IV. IN VIEW OF THE BROAD-RANGING VOIR DIRE QUESTIONING WHICH WAS PERMITTED, THE PETITIONER WAS NOT DENIED DUE PROCESS OF LAW IN VIOLATION OF MORGAN v. ILLINOIS, 501 U.S. ___, 112 S.Ct. 222 (1992) WHEN THE TRIAL COURT PREVENTED THE PETITIONER FROM QUESTIONING A PROSPECTIVE JUROR CONCERNING HIS "FEELING" ON THE NORTH CAROLINA REQUIREMENT THAT ADDITIONAL AGGRAVATING CIRCUMSTANCES MUST BE PROVEN TO JUSTIFY A SENTENCE OF DEATH; MOREOVER, THE NORTH CAROLINA SUPREME COURT PROPERLY HELD THAT ANY ERROR UNDER MORGAN WAS HARMLESS BEYOND A REASONABLE DOUBT.

The Petitioner argues that the trial court placed "undue restrictions" upon his voir dire of potential jurors, thereby preventing him from ascertaining whether the jurors could follow the law with respect to the capital sentencing procedure in violation of this Court's recent decision in Morgan v. Illinois, 501 U.S. ___, 112 S.Ct. 2222 (1992). (PWC at 52) During the jury voir dire, the following colloquy occurred between defense counsel and prospective juror David M. Kimbrough:

> MR. GALLOWAY: Mr. Kimbrough, if the State were to satisfy you and the jury beyond a reasonable doubt that Ricky Price was guilty of first degree murder, would you then be comfortable in requiring the State to show additional aggravating factors according to the Judge's instructions?
>
> MR. KIMBROUGH: According to the Judge's instructions, yes.
>
> MR. GALLOWAY: Okay. Do you feel that it should be necessary for the State to show additional aggravating factors before you would vote to impose the death penalty?
>
> MR. BREWER: Objection.
> THE COURT: Sustained.

A reasonable likelihood arose from these unconstitutional instructions that an individual juror would understand that *her* answer to a specific mitigating circumstance must be "No" *unless the entire jury agreed* that this mitigating circumstance was proved by a preponderance of the evidence. *See Boyde v. California*, 494 U.S. 370 (1990). In the context of the entire charge, a reasonable juror would be hard pressed to understand the challenged instructions to mean that a negative finding of a particular mitigating factor would not be *her* answer if the jury could not unanimously agree that the mitigating factor existed. "Jurors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the way lawyers might. [A] common sense understanding of the instructions in light of all that has taken place at the trial is likely to prevail over technical hairsplitting." *Id.* at 329. This "common sense" understanding is particularly appropriate in this case where an individual juror was responding to a question without opportunity for deliberation or discussion with respect to its meaning.

The trial court instructed the sentencing jury on at least ten occasions that it *must* answer "No" to a mitigating circumstance if the jury did not agree unanimously as to its existence. There was no suggestion that any individual juror could have a different ultimate answer to a particular mitigating circumstance than the answer of the jury. There could be only one answer for the entire jury. A reasonable juror would have understood this instruction to mean that the jury's negative answer and, hence, her negative answer to any particular circumstance depended on the absence of a unanimous agreement that the circumstance had been proved by a preponderance of the evidence. If a juror so understood the instructions, then *her individual* answer to a mitigating circumstance would be "No" if the jury failed to agree unanimously as to the existence of this circumstance. Under these conditions, an individual juror's assent to the "No" answer during the poll would simply indicate her agreement that the jury failed to find this circumstance unanimously, not that *she* would have failed to find it if she

> their ability to follow the court's instruction in regard to these circumstances and apply the law according to the instructions. This should have enabled the defendant to determine whether to challenge a juror on the ground he would automatically vote for the death penalty if the defendant was found guilty.

State v. Price, 334 N.C. at 618, 433 S.E.2d at 747-48; (P.App. 43-44).[6]

Given the otherwise broad-ranging voir dire questioning which was permitted, even under Morgan the North Carolina Supreme Court properly held that the error, if any, was harmless beyond a reasonable doubt. Moreover, though not necessary to the decision below, there was no Morgan error since the questioning by defense counsel was sufficient to satisfy the Petitioner's right under Morgan to make the requisite inquiry for possible bias. Therefore, the facts of this case are distinguishable from Morgan.

In Morgan, a majority of this Court held that "Petitioner was entitled, upon his request, to inquiry discerning those jurors who, even prior to the State's case-in-chief, had predetermined the terminating issue of his trial, that being whether to impose the death penalty." Morgan v. Illinois, 501 U.S. at

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6 Contrary to the Petitioner's representation in his petition, the North Carolina Supreme Court did not find that Morgan error occurred during jury voir dire. (PWC at 56) Justice Webb, writing for a unanimous court, did not decide whether there was Morgan error, since the court agreed that even assuming there was Morgan error, the error was harmless beyond a reasonable doubt. State v. Price, 334 N.C. at 618, 433 S.E.2d at 747-48; (P.App. 43-44).

___, 112 S.Ct. at 2233. However, in Morgan, the trial court conducted the voir dire of the prospective jurors rather than the attorneys. The trial court refused defense counsel's request to ask all prospective jurors if they found Morgan guilty, would they automatically vote to impose the death penalty regardless of the facts. This Court agreed that the trial court's general "follow the law" questioning of the prospective jurors was not sufficient to satisfy Morgan's right to make inquiry for biased jurors, and such restrictions upon Morgan's inquiries rendered his trial fundamentally unfair.[7] Morgan v. Illinois, 504 U.S. at ___, 112 S.Ct. at 2232-35.

A review of the jury voir dire here confirms that, unlike Morgan, the trial court did not unconstitutionally limit the Petitioner's right to make inquiry for biased jurors. Initially, it should be noted that in North Carolina, unlike Illinois, the attorneys rather than the court conduct the majority of the voir

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7 In Morgan, this Court cited State v. Rogers, 316 N.C. 203, 216-18, 341 S.E.2d 713, 722 (1986) as recognizing a capital defendant's right to question prospective jurors about their views on the death penalty so as to insure a fair and impartial verdict. Morgan v. Illinois, 501 U.S. at ___ n. 4, 119 L.Ed.2d at 500 n. 4. The trial court in Rogers prohibited voir dire questioning about whether the prospective juror could conceive of circumstances wherein she would impose a life sentence rather than the death penalty and whether she automatically would vote for the death penalty if the jury found the defendant guilty. The North Carolina Supreme Court held that there was no abuse of discretion in the trial court's limitation of such questioning, noting that a review of the voir dire showed that the defendant "was clearly afforded an opportunity to question each juror on his or her death penalty views." State v. Rogers, 316 N.C. at 218, 341 S.E.2d at 722.

This Court has had occasion many times in the past to answer questions about the jury's deliberations in the sentencing phase of a capital case so that, among other things, the structure of capital sentencing hearings would permit full consideration of mitigating evidence and so that the actors in the system - be they jurors or judges - would be free to play the roles they have been assigned in such hearings. The Eighth and Fourteenth Amendments require no less. As this case demonstrates, there are still more questions to be answered.

The members of the jury in this case were unconstitutionally instructed that they could not consider and give effect to whatever evidence they deemed to have mitigating value unless all of the jurors agreed that such evidence had mitigating value. The state appellate court then found that this error was harmless based on a misreading of the results of a jury poll. No one ever heard from the individual jurors in this case an answer to the question of how they would have voted - life or death - if they had been allowed to do what the Constitution requires that they are free to do, i.e., to consider mitigating circumstances that fewer than all of the jurors thought had been established by a preponderance of the evidence.

The flaw of the unanimity rule, as found by this Court in McKoy, is the deprivation of a defendant's right to have each juror, individually, weigh such mitigating circumstances as he or she deems established against such aggravating circumstances as are proved by the state, and then vote individually on life or death. This flaw was not avoided for the Petitioner by a mere polling to ascertain whether the foreman reported correctly on unanimity, for it is the unanimity requirement itself that is the flaw. This Petitioner, no less than petitioner McKoy, is entitled to a new penalty trial.

In Clemons v. Mississippi, 494 U.S. 738 (1990), this Court held that it was constitutionally permissible for state appellate courts to engage in harmless error analysis in an effort to determine "whether beyond a reasonable doubt the result would have been the same" if a particular aggravating circumstance had not been erroneously defined in the jury instructions.

Citing Clemons, and without further analysis, the North Carolina Supreme Court held in McKoy, 394 S.E.2d at 433, that harmless error analysis was equally applicable to improper jury instructions in the sentencing phase of a capital case that restrict the ability of individual jurors to consider and give effect to mitigating evidence. This Court should decide whether such a broad reading of Clemons is appropriate when the constitutional defect at issue encroaches upon the jury's

from asking the prospective jurors the automatic imposition of the death penalty question.

On several occasions during the voir dire questioning, the Petitioner's defense counsel attempted to explain and emphasize that in order to return a recommendation of a death sentence the jury would have to consider and find aggravating circumstances above and beyond the fact that the Petitioner had committed a first-degree murder. (R.App. 45-46, 50, 52) The trial court also instructed the prospective jurors on the procedure for returning a death sentence recommendation. (R.App. 49, 53-54) At one point during the voir dire, after the State's objections to similar questions had been sustained, defense counsel was permitted to ask at least six of the prospective jurors if they "could require the State to prove aggravating factors over and above first degree murder before [they] would vote for the death penalty." (R.App. 55-56) On other occasions, defense counsel was permitted to inquire if the jurors felt that a death sentence was the only appropriate punishment for a conviction of first-degree murder. (R.App. 57, 58, 59-60, 61-62, 63, 64, 65, 66, 67, 69, 71, 72, 73-74) Later in the jury voir dire, defense counsel asked if the jurors would require the State to show and prove aggravating factors before voting to impose the death penalty. (R.App. 68, 70, 71, 72, 75-76)

Therefore, unlike in Morgan, defense counsel here was allowed to question the prospective jurors on these general prin-

ciples of law, and fully explored this area for bias with potential jurors as the jury voir dire progressed. In fact, as to juror Kimbrough, the Petitioner's defense counsel was allowed to ask and Kimbrough answered without objection that he would "be comfortable in requiring the State to show additional aggravating factors according to the Judge's instructions." (P.App. 84-85) Earlier, Kimbrough was asked and answered that he would consider mental or emotional disturbance as a mitigating factor to weigh against the State's aggravating circumstances. (R.App. 77-80) Kimbrough also indicated that he could follow the trial court's sentencing instructions, and that he felt that he fully understood the instructions. (R.App. 81) Under these circumstances, the questions which defense counsel propounded to Kimbrough and others were sufficient under Morgan to allow the Petitioner to exercise intelligently his challenges for cause against possibly biased jurors who might automatically impose the death penalty after a finding of guilt. As this Court continued to recognize in Morgan, "[t]o be constitutionally compelled . . . it is not enough that such questions might be helpful. Rather, the trial court's failure to ask these questions must render the defendant's trial fundamentally unfair." Morgan v. Illinois, 504 U.S. at ___ n. 5, 112 S.Ct. at 2230 n. 5, quoting, Mu'Min v. Virginia, 500 U.S. ___, ___, 111 S.Ct. 1899, 1905 (1991).

If the trial court's ruling restricting the voir dire questioning violated Morgan, the error, if any, was harmless beyond a

320 n.14 (1979) ("[F]ailure to instruct a jury on the necessity of proof of guilt beyond a reasonable doubt can never be harmless error") (citing Cool v. United States, 409 U.S. 100 (1972); Cf. Taylor v. Kentucky, 436 U.S. 478 (1978)).

These principles are especially important where "there are specific reasons to fear substantial unreliability as well as bias in favor of death sentences." Caldwell v. Mississippi, 472 U.S. 320, 330 (1985), see Luginbuhl, Comprehension of Judges' Instructions in the Penalty Phase of a Capital Trial: Focus on Mitigating Circumstances, 16 Law & Hum. Behav. 203, 214-15 (1992) (improper unanimity instruction effectively prevents consideration of mitigating circumstance "by a juror who thought that it existed by a preponderance of the evidence.") Such a bias against consideration of mitigating evidence was the very reason this Court voided the unanimity instruction given in the sentencing phase of petitioner's trial, see McKoy, 494 U.S. at 439-40, and it is simply impossible now to determine what effect that bias had on the jury's deliberations in this case. "[T]he evaluation of the consequences of an error in the sentencing phase of a capital case may be more difficult because of the discretion that is given to the sentencer." Satterwhite, 486 U.S. at 258.

The decision in Clemons is not to the contrary. In that case, this Court found that a constitutionally defective instruction concerning one of three aggravating circumstances found by the jury might constitute harmless error if it were

possible to determine beyond a reasonable doubt that "the result would have been the same" had that aggravating circumstance been properly defined in the jury instructions. Clemons, 494 U.S. at 754. This case related solely to definition of the "heinous, atrocious and cruel" aggravating circumstance and had nothing to do with the way in which the jury was to approach their deliberations on mitigation. See Pensinger v. California, 112 S.Ct. 351 (1991) (noting that the jury instruction in Clemons "did not alter the mix of evidence weighed by the jury at the penalty phase.")

It is one thing to decide that invalidation of one of three aggravating circumstances found by the jury constitutes harmless error, although this Court refused to accept that conclusion on the record before it in Clemons. It is quite another to announce that McKoy error had no effect on the decision-making processes of the twelve persons in the jury room, a question on which there is not and cannot be any record evidence.

This Court has been presented with this question in a previous request to review a decision of the Supreme Court of North Carolina. Although review was denied, three justices dissented and would have vacated the judgment in that case. Allen v. North Carolina, 113 S.Ct. 1402, 1403 (1993)(Justices Blackmun, O'Connor, and Souter would grant the petition and reverse the judgment). The identical polling process relied upon below to find McKoy error harmless had been used in Allen. Review of this harmless error analysis is in order now.

43-44). Therefore, the state court did "rigorously engage in harmless error analysis before denying relief," (PWC at 52 n. 11), and Brecht, which authorizes a less-stringent harmless error standard on federal habeas review, does not bring into question the North Carolina Supreme Court's direct appeal analysis.

No fundamental unfairness comparable to Morgan occurred in the Petitioner's jury voir dire, and this case does not present a certiorari worthy issue.

V. THE PROSECUTOR'S ARGUMENT COMMENTING ON THE PETITIONER'S ABSENCE OF REMORSE WAS APPROPRIATE UNDER THE CIRCUMSTANCES, AND DID NOT CONTRAVENE FUNDAMENTAL CONSTITUTIONAL PROTECTIONS OF DUE PROCESS OF LAW OR RISK AN UNRELIABLE DEATH SENTENCE UNDER THE EIGHTH AMENDMENT SUCH AS TO RAISE AN IMPORTANT ISSUE WARRANTING CERTIORARI.

The prosecutor, in his closing argument to the jury during the sentencing phase of the trial, commented that the Petitioner had showed no signs of remorse and had not confessed[9] to the murder of Brenda Smith. (P.App. 99-100, 105) Despite the brevity of these remarks and his own failure to object, the Petitioner contends that the exploitation of his failure to express

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9 In his petition, the Petitioner suggests that he did confess, as illustrated by the witnesses who testified to his incriminating statements. (PWC at 62) However, when the Petitioner testified during the sentencing phase he expressly denied both murders of Joan Brady and Brenda Smith. (R.App. 93) Presumably, when the prosecutor commented about the absence of a confession he was referring to the Petitioner's continuing denial of the killings despite the substantial evidence to the contrary, including the Petitioner's own admissions to his forensic psychiatrist that he in fact was present when both Joan Brady and Brenda Smith were murdered. (R.App. 94-95)

remorse at sentencing contravenes fundamental constitutional protections of due process of law under Griffin v. California, 380 U.S. 609 (1965) and risks an unreliable death sentence in violation of the Eighth Amendment. Specifically, he argues that such remarks violated his right to plead not guilty and to require the State to prove its case. Asserting that this important issue is likely to recur in capital proceedings and that a conflict exists among the jurisdictions which have addressed the question, the Petitioner urges this Court to grant certiorari.

The North Carolina Supreme Court rejected this same argument, reaffirming its previous holding in State v. Brown, 320 N.C. 179, 358 S.E.2d 1, cert. denied, 484 U.S. 970 (1987) that "although remorselessness is not a statutory aggravating circumstance and may not be argued as such, see, e.g., Brown, 320 N.C. at 199, 358 S.E.2d at 15, we noted in that case and we note again here that the State never cited this characteristic as an aggravating circumstance to the jury either verbally or on the verdict sheet." State v. Price, 326 N.C. at 85, 388 S.E.2d at 100, citing, State v. Brown, 320 N.C. at 199-200, 358 S.E.2d at 15-16; (P.App. 17). The court also held that "calling the jury's attention to an absence of perceptible remorse does not unconstitutionally 'exploit' a defendant's silence at trial or his unwillingness to admit guilt." State v. Price, 326 N.C. at 85, 388 S.E.2d at 100, citing, State v. Artis, 325 N.C. 278, 327, 384 S.E.2d 470, 498 (1989), vacated and remanded on other grounds

[PROSECUTOR]: Objection.

THE COURT: Sustained.

[DEFENSE COUNSEL]: May I approach the bench?

THE COURT: Yes, sir.

[UNRECORDED SIDE-BAR.]

[DEFENSE COUNSEL]: Mr. Kimbrough, if the State were to satisfy you and the jury beyond a reasonable doubt that Ricky Price was guilty of first degree murder, would you then be comfortable in requiring the State to show additional aggravating factors according to the Judge's instructions?

[PROSPECTIVE JUROR]: According to the Judge's instructions, yes.

[DEFENSE COUNSEL]: Okay. Do you feel that it should be necessary for the State to show additional aggravating factors before you would vote to impose the death penalty?

[PROSECUTOR]: Objection.

THE COURT: Sustained.

[DEFENSE COUNSEL]: Mr. Kimbrough, asking you this not to know whether you would follow the Judge's instructions, but to know in the predisposition of your mind, I'll ask you do you feel that the State should be required to show you additional aggravating factors before you would vote to impose the death penalty?

[PROSECUTOR]: Objection.

ing jury since they necessarily relate to the defendant's character. See Lockett v. Ohio, 438 U.S. 586, 604 (1978). It follows that a defendant's absence of remorse also should be a proper consideration for the jury in determining whether the defendant is deserving of a death sentence. See Payne v. Tennessee, 501 U.S. ___, ___, 111 S.Ct. 2597, 2608-09 (1991) (Eighth Amendment does not per se prohibit capital sentencing jury from considering "victim impact" evidence relating to the victim's personal characteristics and the emotional impact of the murder on the victim's family, or preclude a prosecutor from arguing such evidence at a capital sentencing hearing); California v. Ramos, 463 U.S. 992, 1001-09 (1983) (instruction permitting capital sentencing jury to consider Governor's power to commute a life sentence without possibility of parole is not unconstitutionally prohibited; invites jury to assess whether defendant is someone whose probable future behavior makes it undesirable that he be permitted to return to society); Jurek v. Texas, 428 U.S. 262, 276 (1976) (Stevens, J.) ("What is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine."); Gregg v. Georgia, 428 U.S. 153, 203-04 (1976) (joint opinion) (desirable to allow open and far-ranging argument that places as much information as possible before the sentencing jury). As noted in Payne, this Court "'has deferred to the State's choice of substantive factors relevant to the penalty determination.'" Payne

v. Tennessee, 501 U.S. at ___, 111 S.Ct. at 2608, quoting, California v. Ramos, 463 U.S. at 1001. As with victim impact evidence, a defendant's lack of remorse "is simply another form or method of informing the sentencing authority about the . . . [character of the defendant and his/her moral culpability and blameworthiness], evidence of a general type long considered by sentencing authorities." Payne v. Tennessee, 501 U.S. at ___, 111 S.Ct. at 2608.

Here, the Petitioner took the stand and testified at the sentencing phase of his trial, describing his childhood, family history and past commitments to mental institutions. On cross-examination, the Petitioner denied that he had killed either Joan Brady or Brenda Smith (R.App. 93), even though his own forensic psychiatrist subsequently informed the sentencing jury that the Petitioner had admitted to him being present when both girlfriends were murdered. (R.App. 94-97) Therefore, the facts of this case are not comparable to Lesko v. Lehman, 925 F.2d 1527, 1540-45 (3rd Cir.), cert. denied, ___ U.S. ___, 112 S.Ct. 273 (1991), the primary federal case on which the Petitioner relies to suggest there is a "significant division of authority" on this issue.

In Lesko, the defendant Lesko also testified at the penalty phase of his Pennsylvania capital murder trial, primarily concerning his deprived childhood and family background, but Lesko did not testify as to the merits of the charges against him, and

he was not cross-examined by the prosecution. On federal habeas review, Lesko challenged comments made by the prosecutor in his closing argument that Lesko had taken the witness stand, but "he didn't even have the common decency to say I'm sorry for what I did," and that it was the jury's "duty" to even the "score," which stood at "John Lesko and Michael Travaglia two, Society nothing." Lesko, 925 F.2d at 1540. Lesko argued that the prosecutor's remarks about his failure to express remorse constituted a comment on his assertion of his Fifth Amendment privilege against self-incrimination, in violation of Griffin v. California. Pennsylvania countered that such comments should not be considered an improper comment on Lesko's failure to testify since Lesko did in fact testify at the penalty phase. In addition, Pennsylvania characterized the remarks as an appropriate "exhortation to the sentencing jury to consider Lesko's demeanor." Lesko, 925 F.2d at 1541. The Third Circuit agreed that the Griffin rule is applicable to both the guilt and sentencing phases of a capital trial, but held that a capital defendant "does not completely waive his Griffin rights by testifying at the penalty phase solely on mitigating factors that are wholly collateral to the merits of the charges against him." Lesko, 925 F.2d at 1541-42, 1543 n. 15, distinguishing, Tucker v. Francis, 723 F.2d 1504, 1508-14 (11th Cir.) (by testifying at penalty phase on merits of charges, defendant waived right to preclude prosecutor from commenting on defendant's failure to testify

during guilt phase), vacated for reh'g en banc, 728 F.2d 1358 (11th Cir. 1984), reinstated in relevant part, 762 F.2d 1496 (11th Cir. 1985) (en banc), cert. denied, 478 U.S. 1022 (1986). Since Lesko's penalty phase testimony about his childhood, family background, and schooling did not bear a tangential relationship to the substance of the charges against him, his limited testimony did not constitute a waiver of his right under Griffin to be free from prosecutorial comment about his failure to testify and rebut the merits of the prosecution's case.

In contrast to Lesko, the Petitioner here did testify not only to biographical mitigating factors, but also was cross-examined extensively about the substance of the charges, including both murders. Therefore, although the Third Circuit went on to hold that the prosecutor's comment about Lesko's failure to express remorse "constituted an impermissible comment on Lesko's failure to testify on the merits" in violation of Griffin v. California, Lesko, 925 F.2d at 1544-45, Lesko is inapplicable to the present case. Even assuming under Lesko the applicability of Griffin to the sentencing phase, the Petitioner waived any Griffin rights against prosecutorial comment on matters reasonably related to his credibility or the subject matter of his testimony, including remarks about his absence of remorse. See also Kennedy v. Dugger, 933 F.2d 905, 913-15 (11th Cir. 1991) (where prosecutor's remarks were confined to defendant's penalty phase testimony, scope of defendant's waiver of right to remain

silent at penalty phase of capital murder prosecution was broad enough to permit prosecutor to comment that defendant did not indicate his state of mind), cert. denied, ___ U.S. ___, 112 S.Ct. 957, reh'g denied, ___ U.S. ___, 112 S.Ct. 1518 (1992). Moreover, Lesko also is distinguishable because the Third Circuit granted habeas relief based on the cumulation of the Griffin violation, along with the prosecutor's "appeal to vengeance" comments. Lesko, 925 F.2d at 1546-47.

In addition to the Eleventh Circuit's decisions in Tucker and Kennedy, the Fourth Circuit has found no constitutional impropriety in a prosecutor arguing at sentencing that a capital defendant had shown no remorse. Gaskins v. McKellar, 916 F.2d 941, 951 (4th Cir. 1990) (state prosecutor's argument during sentencing phase of capital murder trial, to effect that defendant had shown no remorse, did not constitute improper comment on defendant's refusal to testify during guilt phase of trial, where comment was directed toward defendant's anticipated sentencing argument and fact he had shown no remorse for previous murders of which he had been convicted, which had been introduced as aggravating factors), cert. denied, ___ U.S. ___, 111 S.Ct. 2277, reh'g denied, ___ U.S. ___, 112 S.Ct. 14 (1991). See also, Resnover v. Pearson, 965 F.2d 1453, 1465 (7th Cir. 1992) (prosecutor's comments regarding defendant's refusal to be present in courtroom during penalty phase were not comments on defendant's refusal to testify).

The several state cases cited by the Petitioner for the conflicting proposition that it is improper to use a defendant's failure to express remorse against him in a capital sentencing proceeding also fail to show that certiorari review is warranted. All of the cases are decisions of state law, and do not purport to construe the Due Process Clauses of the Fifth and Fourteenth Amendments, or apply Eighth Amendment analysis. Moreover, Owen v. State, 656 S.W.2d 458, 459-60 (Tex. Crim. App. 1983) (en banc) and People v. Coleman, 80 Cal.Rptr. 920, 459 P.2d 248, 254 (1969) are distinguishable in that both involved defendants whose trial testimony at the guilt phase was followed by prosecutorial comments at the penalty phase condemning the defendants' lack of remorse, whereas here the Petitioner testified at the sentencing phase. Similarly, State v. Sloan, 298 S.E.2d 92, 95 (S.C. 1982) merely supports the proposition that a prosecutor may not urge a jury to consider a defendant's plea of not guilty as evidence that the defendant lacked remorse. In Pope v. State, 441 So.2d 1073, 1077-78 (Fla. 1983), the Florida Supreme Court held that a defendant's lack of remorse may not be considered in support of or to enhance the aggravating circumstance of especially heinous, atrocious or cruel. At most, these decisions reflect the various choices of these respective states as to the appropriateness of commenting on a capital defendant's lack of remorse, see Payne v. Tennessee, 501 U.S. at ___, 111 S.Ct. at 2608, and do not

represent a true conflict on an important issue of constitutional law.

Therefore, the prosecutor's sentencing phase comment on the Petitioner's lack of remorse was not constitutional error. The prosecutor's brief remarks on the Petitioner's lack of remorse otherwise were proper, did not infect the sentencing proceedings with fundamental unfairness, and likewise did not undermine the reliability of the Petitioner's death sentence. The North Carolina Supreme Court's decision on this issue does not warrant review on certiorari.

CONCLUSION

For the reasons discussed above, the Petitioner has failed to identify any state or federal cases which are in conflict with the decision by the North Carolina Supreme Court affirming his conviction of first-degree murder and death sentence. This Court's review of that decision is not warranted, and therefore the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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No. 585 A 87 **NINTH DISTRICT**

SUPREME COURT OF NORTH CAROLINA

****

STATE OF NORTH CAROLINA)
) **From Person**
v.)
)
RICKY LEE PRICE)

****

DEFENDANT-APPELLANTS BRIEF

****

FILED
JUL 21

XIV. **THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN PRECLUDING DEFENDANT FROM ARGUING THE SENTENCING JUDGE'S ABILITY TO RUN CONSECUTIVELY A LIFE SENTENCE RECOMMENDED BY THE JURY TO THE LIFE SENTENCE PRESENTLY BEING SERVED BY DEFENDANT IN VIRGINIA AND FROM ARGUING THE PERIMETERS OF ANY POSSIBLE PAROLE ON A LIFE SENTENCE IMPOSED FOR FIRST-DEGREE MURDER IN NORTH CAROLINA, AS THESE ARGUMENTS WERE A PROPER EXPLANATION OF THE LAW AND THEIR EXCLUSION PREVENTED DEFENDANT FROM HAVING THE JURY CONSIDER LEGITIMATE REASONS FOR THE IMPOSITION OF A SENTENCE LESS THAN DEATH, THEREBY DEPRIVING HIM OF HIS CONSTITUTIONAL RIGHTS TO BE FREE FROM CRUEL AND UNUSUAL PUNISHMENT.**

Assignment of Error No. 44, Rp. 73
Exception No. 132, Tp. 1992
Exception No. 134, Tp. 1994

Immediately preceding defendant's arguments to the jury during the punishment phase of this case, the trial court made two important rulings. First, he precluded defense counsel from arguing "anything concerning the possibility of parole" to the jury. (Tp. 1992) Second, he rejected defense counsel's proffer of an argument to the jury that the trial judge was empowered to impose a life sentence, if recommended by the jury, which would run at the end of the life sentence defendant was presently serving in Virginia. (Tp. 1994)[13] The eighth amendment requires, at a minimum, that defendant be afforded the opportunity to present relevant mitigating evidence to the sentencer and to have the sentencer consider this evidence in its determination of punishment. *E.g., Eddings v. Oklahoma,* 455 U.S. 104 (1982); *Lockett v. Ohio,* 438 U.S. 586 (1978). Furthermore, the legislature has determined the jury may consider any other circumstance arising from the evidence which it deems to have mitigating value. *See*

[13]The state had introduced evidence, of its own accord, of defendant's conviction for first-degree murder in Virginia and the imposition of a life sentence thereon. (Tp. 1565)

N.C. Gen. Stat. §15A-2000(f)(9). Quite plainly, preventing defense counsel from arguing the legal effect of a life sentence in North Carolina with respect to parole eligibility and from arguing the law regarding the potential imposition of consecutive life sentences ran completely counter to this basic eighth amendment and statutory principle. Since the trial court's rulings prevented defendant from having the jury consider legitimate bases for the imposition of a sentence less than death, the punishment imposed in this case cannot stand. Accordingly, defendant must receive a new sentencing hearing.

A. The Applicable Law.

The sentencer in a capital case may "not be precluded from considering, *as a mitigating factor,* any aspect of a defendant's character or record and any circumstances of the offense that the defendant proffers as a basis for a sentence less than death. Equally clear is the corollary rule that the sentencer may not refuse to consider or be precluded from considering 'any relevant mitigating evidence.' " *Skipper v. South Carolina,* 476 U.S. 1, 4 (1986) (citations omitted) (quoting *Eddings,* 455 U.S. at 110, 114). These rules are "well established," *Skipper, id.,* and "beyond dispute." *Mills v. Maryland,* 100 L.Ed.2d 384, 393 (1988). In *Eddings,* the Oklahoma death penalty statute permitted the defendant to present any evidence regarding potentially mitigating circumstances. 455 U.S. at 115 n.10. The North Carolina statute is similarly broad, as the catchall provision permits the jury to consider "[a]ny circumstance arising from the evidence which the jury deems to have mitigating value." N.C. Gen. Stat. §15A-2000(f)(9). As *Eddings* cogently explained, once the legislature permits consideration of any of a myriad of circumstances as might form the basis for a sentence less than death, "Lockett requires the sentencer to listen." *Id.* While the sentencer remains free to

weigh prospective mitigation, the mitigation may not be given no weight by the virtue of its exclusion from the sentencer's consideration. *Id.* at 115.

The gist of this argument rests upon the trial court's action in precluding defense counsel from arguing legitimate matters of evidence and applicable legal principles that might serve as a basis for a sentence less than death. Such a ruling

> that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments.

Lockett, 438 U.S. at 605. It is beyond peradventure that *Lockett* and its progeny prohibit statutes, evidentiary rulings, and jury instructions that preclude the sentencer from considering "factors which may call for a less severe penalty." It is abundantly clear that the trial court's restrictions upon defense counsel's closing arguments ran afoul of this constitutional prohibition. As the Supreme Court noted in *Skipper*, it is of no moment that the proffered evidence related neither to defendant's culpability for the crime nor to the circumstances surrounding the crime itself. "Although it is true that any such inferences would not relate specifically to petitioner's culpability for the crime he committed, there is no question but that such inferences would be 'mitigating' in the sense that they might serve 'as a basis for a sentence less than death.' " *Skipper*, 476 U.S. at 4-5 (citations omitted).

The actions of the trial court also violated the well-settled rule in this jurisdiction permitting counsel to argue the law as well as the facts of a case to the jury. This statute simply provides: "In jury trials the whole case as well of law as a fact may be argued to the jury." N.C. Gen. Stat. §84-14; *see State v. Murray*, 310 N.C. 541, 313 S.E.2d

523 (1984); *State v. Hardy*, 299 N.C. 445, 263 S.E.2d 711 (1980). The statutory predecessor to this provision was adopted by the legislature in response to the nineteenth century practice of the trial courts in this state to curtail closing arguments that departed from strict adherence to the facts of the case. To remedy this problem, "the Legislature passed an act allowing counsel to argue both the law and the facts to the jury." *State v. Miller*, 75 N.C. 73, 74 (1876). The judicial interpretations of this provision are unequivocal. For example, a defense lawyer must be permitted to read to the jury statutory provisions prescribing the punishment for the crime charged. It is reversible error to prohibit counsel from doing so in closing argument. *E.g., State v. Irick*, 291 N.C. 480, 213 S.E.2d 833 (1977); *State v. McMorris*, 290 N.C. 286, 225 S.E.2d 553 (1976). An attorney is permitted to read a statute relevant to his case, but simply must avoid incorrectly stating the law or misleading the jury. *E.g., State v. Britt*, 285 N.C. 256, 204 S.E.2d 817 (1974). This Court has recently reaffirmed the basic principle allowing counsel "to argue the law to the jury which includes the authority to read and comment on reported cases and statutes." *State v. Gardner*, 316 N.C. 605, 611, 342 S.E.2d 872, 876 (1986).

B. Improper Restriction Of Argument Concerning Consecutive Life Sentences.

As noted previously, the prosecution was permitted to introduce, over defendant's objections, the language of the Virginia judgment rendered in the Joan Brady case. This included language that "Ricky Lee Price is hereby sentenced to confinement in the penitentiary of this Commonwealth for life under Indictment One for murder . . . ." (Tp. 1565) Once the prosecution was permitted to introduce this evidence to support one of its submitted (and eventually found) aggravating circumstances, defendant was entitled to offer evidence calculated to mitigate its

possible effect, *Skipper*, 476 U.S. at 5, or to rebut it altogether. *Gardner v. Florida*, 430 U.S. 349, 362 (1977). As part of this effort, defendant proposed to argue to the jury the applicable law in North Carolina with respect to concurrent and consecutive sentences.

During a colloquy between the trial court and counsel for both sides, outside the presence of the jury, defendant made the following proffer:

> My argument to the jury would be that the Court has it within its power and discretion to impose a life sentence which would run at the end of the life sentence which the defendant is serving in the State of Virginia.

(Tp. 1994) At that juncture, the trial court told defense counsel "you may not argue that to the jury." (Tp. 1994) This limitation was erroneous.

In the first place, this proposed argument was an accurate statement of the statutory law in North Carolina and was not misleading to the jury. The applicable statute provides:

> When multiple sentences of imprisonment are imposed on a person at the same time or when a term of imprisonment is imposed upon a person who is already subject to an undischarged term of imprisonment, including a term of imprisonment in another jurisdiction, the sentences may run either concurrently or consecutively, as determined by the Court.

N.C. Gen. Stat. §15A-1354(a). Furthermore, the mitigating effect of consecutive sentences is obvious when further resort is had to the law in this jurisdiction. "When it is a consecutive sentence, it commences to run when the State has custody of the defendant following completion of the prior sentence." N.C. Gen. Stat. §15A-1355(a). The meaning of these two statutory provisions are clear and unmistakable. The trial court was empowered to run a life sentence recommended by defendant's jury consecutively to the life sentence he was presently serving in Virginia, a fact about

which his jury was already aware. Furthermore, the jury would doubtlessly conclude that if it recommended a life sentence for defendant in the case *sub judice* and the trial court ran it consecutively to the Virginia life sentence, then the life sentence recommended in this case would begin *only* after the Virginia life sentence had expired.

The trial court's ruling was erroneous in two respects. First, it impermissibly precluded defendant from exercising his right to argue the applicable law to the jury. Once the jury knew he was serving a life sentence imposed in another jurisdiction, the potential for consecutive life sentences became relevant. Once this potentiality became relevant, section 15A-1354 became applicable, and defense counsel was entitled to read it and argue its effect to the jury. Under the plain language of section 84-14 and the interpretive decisions of this Court, the trial court stripped defendant of an important statutory right.

The prejudicial effect of this error is best understood by considering the second way in which the trial court erred. Its ruling prohibited defendant from exercising his constitutional right to have the jury consider relevant facts and circumstances that might lead it, as the sentencer in a capital case, to fix punishment at something other than death. As *Lockett* and its progeny make clear, precluding the sentencer from considering any relevant evidence that might serve as a basis for a sentence less than death offends basic eighth amendment principles.

Certainly, the prospect that defendant might face two, consecutive life sentences, the second of which could only begin at the expiration of the first, might lead the sentencer in this case to fix punishment at something less than death. Defendant was almost thirty-years old at the time of his trial. As noted below, under the applicable provisions for a life sentence in North Carolina, he would not even be eligible for parole until he has served at least twenty years on his North Carolina sentence. *See*

N.C. Gen. §15A-1371. In combination with a preceding Virginia life sentence, defendant's jury could be more assured of his continued confinement away from members of society for an extremely long period of time. These inferences, wholly consistent with and reasonably inferable from the law applicable to this case, could easily serve as a basis for a sentence less than death.

To the extent that this Court determines that the fatal flaw in the trial court's ruling with respect to the argument about the potential consecutive nature of the two life sentences, defendant has satisfied his burden of showing that a different result might likely have been reached had this error not been committed. He has demonstrated the error was not harmless. *See* N.C. Gen. Stat. §15A-1443(a). Even if the Court determines that a statutory violation has not occurred, defendant has certainly demonstrated constitutional error. On these facts, the state simply cannot satisfy this Court that this constitutional error was harmless beyond a reasonable doubt.

C. Improper Restriction Of Argument Concerning Parole Eligibility.

During the same colloquy noted above, the trial court placed another restriction on defendant's closing arguments. He told defense counsel they "may not argue anything concerning the possibility of parole, the possibility of executive clemency, the possibility of any other governmental agency taking steps in connection with the sentencing proceeding." (Tp. 1992) This restriction offended both the statutory entitlement to argue the applicable law to the jury and the constitutional opportunity to have the sentencer consider mitigation that might serve as a basis for a sentence less than death. For both of these reasons, the trial court also erred in placing this restriction upon defendant.

As a statutory matter, if defendant received a life sentence for first-degree murder in North Carolina, he would not actually be *eligible* for parole consideration until serving at least twenty years in prison. N.C. Gen. Stat. §15A-1371. Defendant should have been permitted to argue this law to the jury. It is certainly not misleading in terms of establishing the minimum amount of time defendant would have to serve before becoming eligible for parole if his jury had recommended a life sentence. As other applicable statutes make clear, once given a life sentence for first-degree murder, defendant would not be entitled to any credit for good behavior or gain time in an effort to accelerate his parole eligibility. *See, e.g.*, N.C. Gen. Stat. §15A-1355(c) (no credit for good behavior available to persons sentenced to life in prison for first-degree murder, a Class A felony); N.C. Gen. Stat. §148-13(c) (credit for good behavior not applicable to persons sentenced to life in prison for first-degree murder, a Class A felony); N.C. Gen. Stat. §148-13(d) (persons convicted of a Class A felony, *e.g.*, first-degree murder, not included under provisions creating gain time). Defendant should certainly have been permitted to argue these statutory provisions to the jury as they were applicable to the evidence and issue before it, that is, the appropriate punishment to be imposed.

The importance of making the argument prohibited by the trial court cannot be overstated. Unquestionably, the public holds gross misconceptions about the actual effect of imposing a life sentence in a case involving a conviction for first-degree murder. Seventy percent of the American people believe that a person given a life sentence will not remain incarcerated for the remainder of his life. Bennack, *The Public, the Media, and the Judicial System: A National Survey of Citizen's Awareness*, 7 No.4 State Ct. J. 4, 10 (1983). A recent study in Georgia revealed the average juror thought a murderer given a life sentence would be *released* in seven or eight years. Codner, "The Only Game in Town: Crapping Out in Capital Cases Because of Juror

Misconceptions About Parole" 47-50 (unpublished paper, University of Michigan School of Law, 24 January 1986). In general terms, this recognition hinges on the notion that a life sentence does not mean a life sentence.

In addition to these general, wide-scale statistics, limited studies conducted in particular cases have confirmed the misconceptions harbored by jurors about people in capital cases. Paduano & Smith, *Deathly Errors: Juror Misconception Concerning Parole in the Imposition of the Death Penalty*, 18 Col. Human Rights L. Rev. 220-25 & nn.34, 35 (1987). In three cases, post-sentence surveys were done of the sentencing jurors or the trial venire. The results were exceedingly consistent and strikingly alarming. They revealed two critical facts. First, jurors consistently underestimated the time a person must serve on a life sentence for first-degree murder before becoming eligible for parole. In two Georgia cases, the vast majority of jurors felt this time period was only seven years rather than the twenty-five years. In Mississippi, the overwhelming majority felt the time period was only five to ten years. Second, in both Georgia cases, two-thirds of the jurors indicated that they would have been more likely to sentence the particular defendant to a life sentence had they been informed that he would have to spend at least twenty years in prison prior to becoming eligible for parole. In the Mississippi case, two-thirds of the jurors indicated they would be more likely to give a life sentence if they knew that the person would never be eligible for parole. *Id.*

Recently, the Maryland Court of Appeals concluded that a defendant facing the death penalty should be allowed to place before the sentencing jury relevant and competent evidence concerning his eligibility for parole should a life sentence be granted. *E.g., Doering v. State*, 313 Md. 384, 411-12, 545, A.2d 1281, 1295 (1988). In *Doering*, defendant offered a broad-based argument in support of his position, contending that evidence relating to parole is material to the question of the

appropriateness of a life sentence and therefore may operate as a mitigating circumstance. Agreeing with his position, the Maryland court noted that its death penalty statute, like that in North Carolina, is structured to give broad discretion to the sentencing authority, especially with respect to the consideration of mitigating circumstances. "If the sentencing authority perceives anything relating to the defendant or the crime which causes it to believe that death may not be appropriate, it may treat such factor as a mitigating circumstance and decide that it [is not outweighed by] the aggravating circumstances." *Foster v. State*, 304 Md. 439, 475, 499 A.2d 1236, 1254 (1985), *cert. denied*, 478 U.S. 1010 (1986). The appropriateness of sentences other than death may be considered by the sentencing authority as a mitigating circumstance. Given these considerations, the Maryland court concluded "that a jury seeking to determine the appropriateness of a life sentence will be aided by information correctly describing the legal and practical effects of such a sentence, and that the existence of an appropriate alternative sentence must certainly be considered a relevant mitigating circumstance." *Doering*, 313 Md. at 411-12, 545 A.2d at 1295. Defendant was therefore entitled to have the jury consider relevant, competent, and non-misleading information "concerning his eligibility for parole in the event a life sentence is imposed . . . ." *Id.* This analysis is equally applicable to defendant.

The North Carolina capital sentencing scheme accords the jury, as sentencer, broad discretion in determining what is mitigating. The jury is statutorily entitled to consider any circumstance that it deems to be mitigating. N.C. Gen. Stat. §15A-2000(f)(9). Defendant's statutory lack of eligibility for parole until serving at least twenty years of his North Carolina life sentence, which time could only begin to run after the expiration of his Virginia life sentence if imposed consecutively thereto, could be considered mitigating in that it could serve as a basis for a sentence less than death. Thus, the trial court's refusal to allow defense counsel to argue this relevant law to the

jury violated defendant's statutory and constitutional rights. In the same respect that the trial court's unjustifiable restriction on defendant's argument with respect to the law on consecutive sentences, the error in this instance is equally not harmless. For the same reason, then, defendant must receive a new sentencing hearing.

XV. THE TRIAL COURT ERRED IN ALLOWING THE PROSECUTOR TO MAKE DEFENDANT'S PURPORTED ABSENCE OF REMORSE AT TRIAL, ARISING SOLELY FROM HIS UNWILLINGNESS TO ADMIT GUILT TO THE JURY AND BASED UPON GROSS MISSTATEMENTS OF THE EVIDENCE, A FACTOR IN THE SENTENCING PROCEEDING.

Assignment of Error No. 43, Rpp. 72-73
Exception No. 136, Tp. 1997

During his closing argument, the prosecutor stressed defendant's purported absence of remorse at trial, long after the crime itself had been perpetrated. The basis underlying this contention was his unwillingness to admit guilt before the jury in the courtroom. That unwillingness was a focal point of the closing argument. (Tpp. 1997) Where defendant's own actions or words outside the courthouse reflect remorselessness, such evidence in some circumstances might be relevant to the issue of the heinousness, atrociousness or cruelty inherent in the killing. *See State v. Gladden,* 315 N.C. 398, 340 S.E.2d 673 (1986); *State v. Pinch,* 306 N.C. 1, 292 S.E.2d 203 (1982). That aggravating factor was neither requested by the state nor submitted by the court. Likewise, if defendant advances remorse in mitigation, he might open the door to rebuttal by the state. *Cf. State v. Brown,* 306 N.C. 151, 293 S.E.2d 569 (1982) (lack of remorse used to rebut non-statutory mitigating factor). Defendant made no such request, evidential presentation, or argument. To exploit at sentencing defendant's failure to express remorse at trial by virtue of his silence or his unwillingness to admit

and be sure that your juror badge is exposed to the public eye at all times during the recess.

Ask that everyone else remain seated as the jurors are being excused.

Jurors are excused for fifteen minutes.

(Whereupon the following took place in the absence of the jury:)

THE COURT: Now, in the absence of the jury, anything before we take our recess?

MR. BREWER: Yes, sir, Your Honor. Your Honor, may I approach?

THE COURT: Yes, sir.

(Side-bar conference was held by the Court, Mr. Brewer, Mr. Currin, Mr. Galloway and Mr. Tolin.)

THE COURT. There is a pending motion which was filed December 11, 1985, by the defense to restrict the District Attorney's argument in connection with general deterrence. The first District Attorney to argue, Mr. Currin, made no argument concerning general deterrence. So the Court will -- the record will reflect the Court's ruling on this motion. The motion is allowed to the following extent. The District Attorney shall not argue at any time before the jury any theory of general deterrence in connection with

the death penalty. The Court also would at this time note for the record that the defense may not argue anything concerning the possibility of parole, the possibility of executive clemency, the possibility of any other governmental agency taking steps in connection with the sentencing proceeding.

MR. BREWER: State would request that the defense be cautioned that the defendant should not argue that the defendant will -- will or may spend the rest of his life in prison providing necessary prevention. The North Carolina Supreme Court says that defense attorneys are cautioned to avoid such remarks at any stage of the proceedings.

MR. GALLOWAY: Does the Court interpret that as meaning in this case that the Court would find it improper to make any reference to the fact that the defendant already has a life sentence facing him?

THE COURT: Mr. Brewer, bring your case into chambers and we'll discuss this for a moment while -- or I will review it in chambers and then we'll go back on the record at the end of the recess.

MR. BREWER: Thank you, Your Honor.

THE COURT: Take a fifteen minute recess.

(Thereupon at 11:05 a.m. the trial

recessed. At 11:20 a.m. the following took place out of the presence of the jury:)

THE COURT: Let the record reflect that the Court has reviewed the case of State versus Boyd, 311 N.C., at Page 425. The Court did this in chambers. The Court has not had the attorneys present while the Court did this.

In connection with the State's request, the Court rules that the defense attorney may not mislead the jury as to the effect of a life sentence. You may argue to the jury that the defendant has received a life sentence in Virginia, but you may not argue as to the effect of a life sentence.

MR. GALLOWAY: I would tender an argument that the -- has the Court finished?

THE COURT: Yes, sir.

MR. GALLOWAY: I would tender an argument to the jury that the Court has it within its potential to impose a consecutive life sentence.

THE COURT: The Court's ruling is that is a matter that is for the Court and not the jury and you may not argue that the Court has the power to give a consecutive life sentence.

MR. GALLOWAY: Thank you. In order that I may preserve that for the record, may I make

that tender to the jury at this time in order not to be objected to during argument and have the objection sustained?

THE COURT: You may state for the record what your argument would be along that line.

MR. GALLOWAY: My argument to the jury would be that the Court has it within its power and discretion to impose a life sentence which would run at the end of the life sentence which the defendant is serving in the State of Virginia.

THE COURT: The Court's ruling is you may not order -- you may not argue that to the jury.

MR. GALLOWAY: Thank you.

THE COURT: Anything further?

MR. TOLIN: Your Honor, if we can show on the record that we would request Issue Four be broken into two different issues, sir. I would note on the record that the written issue sheet was handed to the attorneys just prior to my opening arguments and I had not had an opportunity to read it until after I concluded my opening argument.

THE COURT: Now, just a moment. The fourth issue was straight out of the pattern instructions, is it not?

MR. TOLIN: Yes, sir, it is.

to be on death row? People that kill with a cold and clear mind. People that kill for money. People that continue to go in and knock off ABC stores. Terrorists who kill because a human life is not as important to them as some political ideal. Those are the people that deserve to be on death row. Those are the people that deserve it. Not people like Ricky Price who are sick and I think you will agree that sickness is a major component in what has transpired here. I'm not asking you to forgive him. I'm not asking that for a minute. He's already serving a life sentence. I'm not asking you to forgive a thing. You have already found him guilty, and you know -- you know that you found him guilty.

There is no more final sentence than a sentence of death. You can't do anything more final than that. Each of you has the power if you believe in life to assert your convictions. Never in your life have you had power like you have right now, never in your life.

I hope that you never force a situation in the future that gives you this kind of power because of the awesome responsibility. But you have the power, you have the responsibility.

Ricky's family has suffered. You have

weren't allowed to bring in a lot of her family and a lot of her friends and show you pictures of Brenda Smith while she was alive or to tell you about her background and what type of person she was and what the value to be placed on her life to society was.

Defendant contends that these words rendered his sentence unconstitutionally unreliable in the same way that victim impact statements introduced to the jury during capital sentencing in *Booth v. Maryland*, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440, were held to be irrelevant to the sentencing decision and their admission to create "a constitutionally unacceptable risk that the jury may impose the death penalty in an arbitrary and capricious manner." *Id.* at 503, 107 S.Ct. at 2533, 96 L.Ed.2d at 448. The United States Supreme Court has come to similar conclusions regarding a prosecutor's remarks characterizing the victim's personal qualities. *South Carolina v. Gathers*, 490 U.S. ——, 109 S.Ct. 2207, 104 L.Ed.2d 876, *reh'g denied*, —— U.S. ——, 110 S.Ct. 24, 106 L.Ed.2d 636 (1989).

Unlike evidence placed before the jury in *Booth* and *Gathers*, however, the personal qualities of the victim and the devastation wrought upon her family by her death simply were not invoked by the prosecutor's words in this case. It is true that the "rights of the victim" and those of her family are not relevant to the proper focus of sentencing arguments upon the character of the criminal or the circumstances of the crime. *See, e.g., State v. Brown*, 320 N.C. at 202-03, 358 S.E.2d at 17. *See also South Carolina v. Gathers*, 490 U.S. at ——, 109 S.Ct. at 2211, 104 L.Ed.2d at 883. But these issues were the subject of mere allusion by the prosecutor; if improper, the error was *de minimis*. It was well within the trial court's discretion not to intervene and recognize the error *ex mero motu*. *Brown*, 320 N.C. at 203, 358 S.E.2d at 18. Nor does the trial court's failure to intervene imply an abrogation of defendant's constitutional rights, for as we have held in *State v. Artis*, such "mere allusion to the loss the victim's family feels does not threaten to sweep juror ruminations into the realm of the arbitrary and capricious." *Artis*, 325 N.C. at 327, 384 S.E.2d at 498. Given the solid evidentiary foundation for the two aggravating circumstances found by the jury, we hold that any arguable error in the trial court's failure to intervene was harmless beyond a reasonable doubt. N.C.G.S. § 15A-1443(b) (1988); *Artis*, 325 N.C. at 327, 384 S.E.2d at 498.

[26] The third occasion upon which defendant alleges the trial court erroneously failed to intervene was during the following portion of the prosecutor's argument:

> Jesus says in the Lord's prayer, "Forgive us our trespasses as we forgive those who trespass against us," but you have no right under the law. And you may forgive trespasses in your personal life, you may forgive those trespasses, but you have no right as a sworn juror in the State of North Carolina to forgive the trespasses against the State of North Carolina. That is to have no part in your deliberations. You cannot forgive the defendant for what he did to Brenda Smith. And your verdict, be it life or be it death, should be no reflection on any sympathy or forgiveness or any religious feelings you have about this case.

Defendant rests his argument solely upon the prosecutor's admonition in the last sentence above that jurors must not allow sympathy to inform their recommendation as to defendant's sentence. These words were not the subject of an objection at trial nor were they included amongst defendant's designated exceptions comprising his assignments of error. Despite his failure to object, defendant contends that the trial court's failure to intervene constituted plain error. N.C.R.App.P. 10(c)(4) (1989); *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983). This Court may review such alleged errors when their gravity "amounts to a denial of a fundamental right of the accused." *Odom*, 307 N.C. at 660, 300 S.E.2d at 378 (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir.), *cert. denied*, 459 U.S. 1018, 103 S.Ct. 381, 74 L.Ed.2d 513 (1982)).

The scope of this Court's review on appeal, however, "is confined to a considera-

assents thereto. The polling being unanimous, the Court orders that the issues and recommendation as to punishment form be recorded by the clerk.

Mr. Sheriff, do you want to impose restraints.

(Whereupon leg irons were placed on the defendant.)

THE COURT: Any further motions?

MR. GALLOWAY: If it please the Court, we would at this time move for appropriate relief to set aside the recommendation as outweighed by the evidence and contrary to the law, due to evidence -- due to errors assigned and to be assigned.

THE COURT: Motion is denied.

MR. GALLOWAY: We would make a motion for appropriate relief for a new hearing on the sentencing issues as contrary to the evidence and contrary to law and with respect to the entire proceedings, the guilt phase as well as the non-guilt phase due to errors assigned and to be assigned.

THE COURT: Motion denied. Motion for new trial denied.

MR. GALLOWAY: No more motions at this time.

THE COURT: All right.

PRESERVATION ISSUES

XXI. THE SENTENCING INSTRUCTIONS LIMITED CONSIDERATION OF MITIGATING FACTORS, FOR THE PURPOSE OF THE ULTIMATE SENTENCING DECISION, BY AN INDIVIDUAL JUROR ONLY TO MITIGATING FACTORS UNANIMOUSLY FOUND BY THE JURY AS A WHOLE IN VIOLATION OF LOCKETT V. OHIO, AS CONSTRUED IN MILLS V. MARYLAND.

Assignment of Error No. 48, Rp. 74
Exception No. 152,
Exception No. 155,
Exception No. 156,
Exception No. 157,
Exception No. 158,
Exception No. 159,
Exception No. 160,
Exception No. 161,
Exception No. 162,
Exception No. 163,
Exception No. 164,
Exception No. 166A,
Exception No. 172A,
Assignment of Error No. 49, Rp. 74
Exception No. 166A, Tp. 2066

During the penalty phase of defendant's case, he offered evidence of various specific mitigating factors. The jury as a group found only one of the nine specific mitigating factors submitted. (Rpp. 11-12) When the jurors reached Issue Three and Issue Four and were required to balance mitigation with aggravation, however, each juror was only allowed to consider, in his or her ultimate sentencing decision, mitigation actually found unanimously by the jury. The trial court denied defendant's requested instruction that the jury had to be unanimous to reject a mitigating factor. (Tp. 2065) The prosecutor exploited the unanimity requirement in his closing argument. (Tp. 2005) The eighth amendment will not tolerate a capital sentencing procedure that risks

erroneous imposition of a death sentence by chancing the sentencer's failure to consider all the mitigating evidence. *E.g., Mills v. Maryland*, ___ U.S. ___, 100 L.Ed.2d 384 (1988). Because defendant's sentence of death was imposed in a constitutionally defective manner, it cannot stand.

Defendant recognizes this Court rejected this argument in *State v. McKoy*, 323 N.C. 1, 372 S.E.2d 12 (1988), *cert. granted*, ___ U.S. ___ (1989). Defendant respectfully requests this Court to reexamine this decision in light of the remand for further consideration by the United States Supreme Court in *Lloyd v. North Carolina*, No. 87-6833 (order of 10 October 1988) and the granting of review in *McKoy* and adopt the rationale of Chief Justice Exum's reasoned dissent in *McKoy*.

XXII. THE NORTH CAROLINA DEATH PENALTY STATUTE, SECTION 15A-2000, AND CONSEQUENTLY THE DEATH SENTENCE IN THIS CASE, IS UNCONSTITUTIONAL, IS IMPOSED IN A DISCRIMINATORY MANNER, IS VAGUE AND OVERBROAD, AND INVOLVES SUBJECTIVE DISCRETION, ALL IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 19 AND 27 OF THE NORTH CAROLINA CONSTITUTION.

Assignment of Error No. 31, Rp. 70
Exception No. 3, Tp. 43
Assignment of Error No. 55, Rp. 75
Exception No. 181, Rp. 13
Exception No. 182, Rp. 13
Exception No. 184, Rp. 16

Defendant contends that the North Carolina death penalty statute is unconstitutional and is applied arbitrarily, capriciously, and whimsically and pursuant to a pattern of practice of discrimination on grounds of race, sex, and poverty. It is

No. 585 A 87 NINTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

STATE OF NORTH CAROLINA
v.
RICKY LEE PRICE

From Person

DEFENDANT-APPELLANT'S SUPPLEMENTAL BRIEF

FILED
OCT 5 11 45 AM '90

ARGUMENT

I. THE STATE CANNOT ESTABLISH BEYOND A REASONABLE DOUBT THAT THE UNCONSTITUTIONAL UNANIMITY REQUIREMENT DID NOT PRECLUDE A JUROR'S CONSIDERATION OF MITIGATING EVIDENCE.

Initially, constitutional error clearly occurred in this case because the jury was instructed that it could only consider mitigating circumstances found unanimously by it. *See McKoy v. North Carolina*, 494 U.S. ___, 108 L.Ed.2d 369 (1990). Both the jury instructions and the sentencing recommendation form in this case expressly required jury unanimity to find a mitigating factor. (Tpp. 2043, 2046, 2047-48, 2049, 2050, 2051, 2052-53, 2054, 2055, 2056-57, Rp. 11) Given the existence of this error, the only remaining issue is whether the state can show the error was harmless beyond a reasonable doubt.

Under the facts and circumstances of this case, the state cannot sustain its heavy burden. *See generally State v. Wilson*, 322 N.C. 117, 145, 367 S.E.2d 605, 606 (1988) (describing virtual impossibility of finding harmless an erroneous failure to submit a mitigating factor for the jury to consider given the "nuances of character and circumstance" involved in a capital sentencing hearing). This Court has acknowledged "the constitutional importance of preserving the jury's ability to consider under proper instructions all evidence proffered by a capital defendant that could reasonably mitigate this sentence to something less than death . . . ." *State v. McKoy*, 327 N.C. 31, 44, 394 S.E.2d 426, 433 (1990). Accordingly, "it would be a rare case in which a *McKoy* error could be deemed harmless." *Id.* The present case is far from such "a rare case."

A. Plenary Evidence Supported Each Unfound Mitigating Factor.

At Issue Two in the proceedings below, the sentencing jury considered but failed to find unanimously the following mitigating circumstances:

> -- This murder was committed while the defendant was under the influence of mental illness or emotional disturbance.
>
> -- The capacity of the defendant to conform his conduct to the requirements of the law was impaired by low intelligence.
>
> -- The capacity of the defendant to conform his conduct to the requirements of the law was impaired by manic depressive illness.
>
> -- The capacity of the defendant to conform his conduct to the requirements of the law was impaired by schizophrenic illness.
>
> -- The capacity of the defendant to conform his conduct to the requirements of the law was impaired by emotional instability.
>
> -- The capacity of the defendant to conform his conduct to the requirements of the law was impaired by drug abuse.
>
> -- The capacity of the defendant to conform his conduct to the requirements of the law was impaired by drug-induced mental illness.
>
> -- The capacity of the defendant to conform his conduct to the requirements of the law was impaired by mixed personality disorder.
>
> -- Any other circumstance or circumstances arising from the evidence which you the jury deem to have mitigating value.

(Rpp. 11-12) The jury answered "No" to each of these nine mitigating circumstances after being instructed to so answer each circumstance if the jury did not unanimously find it. (Tpp. 2046, 2047-48, 2049, 2050, 2051, 2052-53, 2054, 2055, 2056-57)

As noted previously, this case is certainly not the rare case in which *McKoy* error can be deemed harmless since, given its federal constitutional dimension, the state must demonstrate its harmlessness beyond a reasonable doubt. N.C. Gen. Stat. § 15A-

1443(b). This Court opined in *McKoy* that a case in which *McKoy* error might be harmless was one "in which there was little or no mitigating evidence proffered, or in which the jury found the existence of all proposed mitigating circumstances but none the less imposed the death penalty . . . ." 327 N.C. at 44 n.4, 394 S.E.2d at 433 n.4. To the contrary, substantial mitigating evidence was presented below. Numerous witnesses -- including three expert psychiatrists, several lay witnesses, and defendant -- testified with respect to mitigation. Obviously, given the jury's rejection, pursuant to the unconstitutional unanimity requirement, of eight specified, statutory mitigating circumstances and the residual provision, defendant's case is not the rare one hypothesized in *McKoy*.

This Court has yet to find *McKoy* error harmless in any case where some evidence supported a mitigating circumstance that the jury failed to find unanimously. *See, e.g., State v. McNeil*, 327 N.C. 388, 395 S.E.2d 106 (1990); *State v. Sanders*, 327 N.C. 319, 395 S.E.2d 412 (1990); *State v. Sanderson*, 327 N.C. 397, 394 S.E.2d 803 (1990); *State v. Robinson*, 327 N.C. 346, 395 S.E.2d 402 (1990); *State v. McKoy*, 327 N.C. 31, 394 S.E.2d 426 (1990); *State v. Brown*, 327 N.C. 1, 394 S.E.2d 434 (1990). The inquiry for this Court is simple: if evidence existed which would have reasonably permitted one or more jurors to find and consider a mitigating circumstance not unanimously found and thus not considered by any juror in the final balancing process, then the *McKoy* error is not harmless. *Sanders*, 327 N.C. at 344, 395 S.E.2d at 428-29.

Considerable evidence supported the mitigating circumstance that the murder was committed while defendant was under the influence of mental illness or emotional disturbance.[1] Substantial evidence existed of defendant's long history of mental

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[1] This circumstance has mitigating value as a matter of law since it is a statutory mitigating circumstance. N.C. Gen. Stat. § 15A-2000(f)(2); *see State v. Pinch*, 306 N.C. 1, 27, 292 S.E.2d 203, 224, *cert.*

illnesses and emotional disturbances. Dr. Arthur Centor, a forensic psychologist, examined defendant in 1984 and, in the course of rendering an opinion and evaluation of his mental condition, relied upon records of various mental institutions where defendant had been previously housed, examined, and treated. (Tpp. 1694-99) Dr. Centor admitted that "an individual may be mentally ill, but not have a defective reason about [a] particular act." (Tp. 1703) Defendant had been hospitalized at Southwestern State Hospital from 12 January 1978 to 1 June 1978. He suffered from a serious, manic-depressive illness. The psychiatric reports showed defendant suffered "evidence of severe thought disturbance and that some of his utterances were apparently delusional, that is, having a false belief, and that his affect or emotions . . . . appeared to be manic in character, manic meaning elated, up as opposed to depressed." (Tpp. 1711-12) Treating doctors prescribed lithium for the manic-depressive illness and mellaril, a psychotropic drug, for the delusional thinking. (Tp. 1714)

The examination and treatment at Southwestern in 1978 was not defendant's first psychiatric hospitalization. His mother, Cleo Price, recounted that he had been housed and treated at Dorothea Dix Hospital for six to eight weeks when he was thirteen or fourteen. (Tp. 1578) He was later transferred to Butner for seven or eight additional months. (Tp. 1579) He was hospitalized at Butner three additional times before he reached the age of eighteen. (Tp. 1581)

Dr. Centor also reviewed records from John Umstead Hospital. (Tp. 1719) During an admission to that institution in 1974, doctors diagnosed defendant as a paranoid schizophrenic. (Tp. 1720) He was subsequently admitted a year later and the same diagnosis was reached. (Tp. 1722) Dr. Centor explained that "schizophrenia is a condition which is not organic. It comes from the life of the individual, the stresses,

denied, 459 U.S. 1056 (1982), *overruled in part on other grounds, State v. Wilson*, 322 N.C. 117, 367 S.E.2d 589 (1988).

strains of living, the inability almost to cope with life, to deal with life." (Tp. 1724) The continual use of narcotics can cause the development of a mental disorder. During defendant's 1975 institutionalization, physicians continued him on psychotropic medication. (Tpp. 1727-28)

Defendant was admitted to John Umstead in 1977 for the fifth time. This involuntary commitment resulted from "a history of recurring psychotic behavior [where defendant] was overactive, agitated, hostile, threatening, and had been in several fights resulting in bodily injuries to others." (Tp. 1729) Psychotic behavior, according to Dr. Centor, is "the extreme form of mental illness which is more than neurosis and neurotic." (Tp. 1730)

Dr. Brad Fisher, a clinical forensic psychologist, evaluated defendant based upon personal interviews with him, as well as reviews of forensic evaluations and other materials concerning defendant. (Tpp. 1870-75) Dr. Fisher opined that defendant suffered from a major mental illness. (Tp. 1877) He found a strong indication of the seriousness of defendant's mental condition based upon the level and consistency of the psychotropic medication he had received for many, many years. (Tp. 1881) He concluded that defendant suffered from a serious mental illness in October 1984 that would have impaired his ability to appreciate the criminality of his conduct and to conform his conduct to the requirements of the law. (Tpp. 1883-84) Defendant had "a very impaired control system" because of his mental illness. (Tp. 1808)

Plenary evidence existed in the record from which a reasonable juror could have found that Brenda Smith was killed while defendant was under the influence of a mental illness or emotional disturbance. In a highly similar situation, a defendant's use of drugs on the day he committed a murder constituted sufficient evidence "from which at least some jurors might have found the existence of this circumstance." *Sanderson*,

327 N.C. at 402, 394 S.E.2d at 806. A reasonable juror certainly could have found this statutory mitigating circumstance from the evidence in this case absent the unconstitutional unanimity requirement. Accordingly, the constitutional error in this case cannot be deemed harmless beyond a reasonable doubt.

Substantial evidence also existed to support the second mitigating factor submitted: that defendant's capacity to conform his conduct to the requirements of the law was impaired by low intelligence.[2] Dr. Centor administered a battery of intelligence and psychological tests to defendant, including the Wechsler Adult Intelligence Scale - Revised, the Bender Gestalt Test, and the Rorschach Test. (Tpp. 1732-37) On the intelligence test, defendant functioned at the borderline level of intelligence between mental retardation and average intelligence. (Tpp. 1717-18) Dr. Centor felt defendant was "closer to mental retardation." (Tp. 1718) Defendant had an IQ between 70 and 79, essentially borderline mental retardation. (Tp. 1748) Dr. Selwyn Rose, a forensic psychiatrist, felt a primary explanation of defendant's mental disorder was his mental retardation. (Tp. 1814) Based upon this substantial evidence, it is impossible to say beyond a reasonable doubt that at least one juror could not have found this statutory mitigating circumstance.

Likewise, the jury heard considerable evidence regarding the statutory mitigating circumstance that defendant's capacity to conform his conduct to the requirements of the law was impaired by manic-depressive illness. As noted previously, Dr. Centor reviewed and testified concerning medical records from various institutions which provided psychiatric treatment to defendant. Doctors at Southwestern State Hospital in 1978 diagnosed him as having a manic-depressive illness. Dr. Centor described this

[2] This circumstance is also mitigating as a matter of law since it is statutory. *See* N.C. Gen. Stat. § 15-2000(f)(6). Each of the unfound mitigating factors, save the catch-all provision, are couched in statutory terms and, hence, have mitigating value as a matter of law.

illness as serious. (Tp. 1706) Doctors prescribed lithium for defendant's manic-depressive condition. (Tp. 1714) Defendant testified regarding his hospitalization at Dorothea Dix, where he was placed in a management ward and strapped to a bed. (Tp. 1612) Sufficient evidence existed from which a reasonable juror could have found this statutory, diminished capacity circumstance.

Additionally, evidence existed to support the fourth mitigating circumstance that defendant's capacity to conform his conduct to the requirements of the law was impaired by a schizophrenic illness. Records from defendant's hospitalization at John Umstead in 1974 revealed a diagnosis of paranoid schizophrenia. (Tpp. 1719-20) This diagnosis involved defendant having a thought disorder of a type that contained delusions and paranoia, thoughts that "people were against him or trying to hurt him or something of that type. Paranoia being abnormal thinking." (Tp. 1721) At a subsequent hospitalization in 1975, the same diagnosis obtained. (Tp. 1722) As Dr. Centor explained, the continual use of drugs can cause the development of a mental disorder such as schizophrenia. One could even have a major episode involving a mental disorder from ingesting just a moderate amount of drugs, especially acid or LSD. (Tp. 1726) Various witnesses testified that defendant frequently used drugs including acid, microdot, and LSD. (Tpp. 1629, 1665-68, 1683) Defendant admitted becoming involved with narcotics when he reached the seventh grade and began "hanging around with [people who] smoked dope and different things." (Tp. 1609) His final hospitalization in a psychiatric institution was caused by using acid or LSD. (Tp. 1620) He admitted using drugs during the period of time when Brenda Smith and Joan Brady died. (Tp. 1629) Quite plainly, a reasonable juror could have found this statutory mitigating circumstance based upon the evidence introduced at the proceedings below.

As a fifth mitigating circumstance, the jury considered whether defendant's capacity to conform his conduct to the requirements of the law was impaired by emotional instability. An inmate who had been incarcerated with defendant in the Danville County Jail stated that defendant admitted killing Brenda Smith and Joan Brady. (Tpp. 1262-65) According to this inmate, defendant felt he had been dating too many people. Things had begun building up on him. He felt he had to eliminate somebody. (Tp. 1268) Defendant was suffering from too much pressure from his involvement with various women. (Tp. 1269) This evidence demonstrated an emotional instability that would have impaired defendant's capacity to conform his conduct to the requirements of the law. Dr. Rose concluded that defendant suffered from "personality disturbances which [where] quite profound." These resulted in his poor impulse control. (Tpp. 1800-01) A juror could have found this factor.

Additionally, abundant evidence existed of defendant's impaired capacity due to his drug abuse, the sixth mitigating factor submitted. Defendant had used drugs since the age of twelve. He smoked marijuana and took acid frequently. He also used synthetic morphine and tried cocaine. (Tpp. 1742-43) Defendant admitted using drugs at the time Brenda Smith was killed. (Tpp. 1229-31) Witnesses who saw defendant during this period time also felt he was under the influence of narcotics. (Tpp. 1676-83, 1854-55) Dr. Rose testified that defendant's condition was impaired in October 1984, in large part, because of his drug abuse. (Tp. 1805) This drug abuse, combined with his mental illness and limited intellectual capacity, completely distorted his thinking. They combined to impair his ability to make judgments, and rational decisions, as well as control his impulses. (Tpp. 1806-07) Defendant suffered from a very impaired control system due to his mental illness and drug abuse. (Tp. 1808) As Dr. Centor had explained, defendant's continual use of drugs could cause a mental disorder. He could have had a major episode involving a mental disorder from ingesting just a moderate

amount of drugs, especially acid or LSD. (Tp. 1726) Given the evidence of defendant's use of drugs around the time Brenda Smith was killed and the expert testimony regarding its effect upon his mental condition, this Court cannot say beyond a reasonable doubt that a rational juror could not have found this statutory mitigating circumstance.

Similarly, this evidence also supported[3] the seventh mitigating circumstance: defendant's capacity to conform his conduct to the requirements of the law was impaired by drug-induced mental illness. Dr. Centor's testimony established how drug use, like that done by defendant, can cause the development of a mental disorder and the explosion of a major episode. Dr. Rose confirmed defendant's drug abuse would completely distort his thinking and impair his ability to make judgments and rational decisions. (Tpp. 1805-07) His capacity to conform his conduct to the requirements of the law would have been impaired by the mental illnesses associated with the drug abuse. (Tp. 1808) Janice Bates, who had lived with defendant until September 1984, noted that he took drugs during this period of time. (Tpp. 1853-54) She saw defendant shortly before the killing and noticed that he was acting very differently from when he was merely drinking. (Tpp. 1854-55) This Court cannot confidently say that, absent the unconstitutional unanimity requirement, a reasonable juror would not have found this mitigating factor.

Additionally, evidence supported the statutory mitigating factor that defendant's capacity to conform his conduct to the requirements of the law was impaired by a mixed personality disorder. Dr. Rose interviewed defendant and requested psychological testing of him. Relying upon this information, as well as the reports of seven other doctors in discharge summaries from various mental institutions, he concluded

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[3] The same evidence may, of course, support multiple, independent mitigating factors. *Sanders*, 327 N.C. at 344, 395 S.E.2d at 429.

defendant had an enormous history of mental illness. (Tpp. 1791-97) Every doctor who had treated defendant used anti-psychotic, "heavy-duty medications." Dr. Rose felt defendant suffered from "personality disturbances which [were] quite profound." Defendant's symptoms could be explained with a diagnosis of "mixed personality disorder plus alcohol and substance abuse." (Tpp. 1812-13) Defendant had a long-standing adjustment problem explained in part by an intermittent affective disorder and alcohol and substance abuse. (Tpp. 1812-13) A reasonable juror could have found this mitigating circumstance based upon the evidence introduced in the sentencing proceeding.

Aside from these statutory, specified mitigating circumstances, evidence also existed from which a reasonable juror could have found a number of unspecified mitigating circumstances. *See* N.C. Gen. Stat. § 15A-2000(f)(9). First, the jury heard, based upon evidence introduced by the prosecution, defendant received a life sentence in Virginia for the killing of Joan Brady. (Tpp. 1563-66) A rational juror could have found this lengthy sentence to be a reason for returning a sentence less than death. As a matter of record, defendant requested the trial court to submit this life sentence as a nonstatutory mitigating circumstance. Based upon the state's objections, however, the trial court declined to submit this factor to the jury.[4] (Tpp. 1930-32)

Likewise, evidence also established defendant had received a fifty-year sentence of imprisonment for the incident at the James Hardy residence. (Tp. 1632) Defendant's jury heard considerable testimony regarding the incident at the Hardy residence during the trial. This evidence included several violent acts by defendant

[4] The trial court independently erred in failing to submit several requested nonstatutory mitigating factors supported by the evidence. *State v. Benson*, 323 N.C. 318, 325-27, 372 S.E.2d 517, 521-22 (1988); *see also State v. Cummings*, 326 N.C 298, 389 S.E.2d 66 (1990) (error in failing to list in writing requested nonstatutory mitigating factors on the issue and recommendation form). This error entitles defendant to a new sentencing hearing irrespective of the resolution of the harmless error analysis of the *McKoy* issue.

toward various individuals. (Tpp. 1201-04) Using both a knife and a gun, defendant threatened to kill several people. (Tpp. 1206-14) Police officers testified that defendant kept them at bay during this incident for approximately five and one-half hours before he was subdued and arrested. (Tpp. 1219, 1239-40) During this incident, defendant also made various incriminating statements. (Tpp. 1204-06, 1222) A rational juror might have found this fifty-year sentence that defendant was already serving constituted a basis for a sentence less than death and therefore, would have been mitigating.

Additionally, the jury might have concluded that defendant suffered from a mental illness that impaired his ability to appreciate the criminality of his conduct. Dr. Fisher explained defendant suffered from a major mental illness. (Tp. 1877) He based this conclusion on his interviews with defendant, reviews of forensic and mental health evaluations, and the level and consistency of medication by psychotropic drugs in defendant's medical history. (Tpp. 1874-75, 1881) Furthermore, Dr. Fisher considered the history of mental illness in defendant's family. (Tp. 1882) In his opinion, defendant suffered from a serious mental illness in October 1984 that would have impaired his ability to appreciate the criminality of his conduct. (Tpp. 1883-84) As a practical matter, evidence that defendant suffered from any condition that impaired his ability to appreciate the criminality of his conduct is mitigating as a matter of law. *See* N.C. Gen. Stat. § 15-2000(f)(6). At no time, however, did the trial court instruct the jury regarding the mitigating nature of defendant suffering from an impairment to his ability to appreciate the criminality of his conduct.[5] Based upon the evidence below, a reasonable juror could have found that defendant suffered from a mental illness which

[5] The trial court should have instructed the jury on this statutory mitigating factor, even absent defendant's request or over his objection. *State v. Lloyd*, 321 N.C. 301, 311-13, 364 S.E.2d 316, 323-24 (1988), *vacated and remanded on other grounds*, 108 L.Ed.2d 601 (1990). This error entitles defendant to a new sentencing hearing irrespective of the prejudice from the *McKoy* error.

impaired his ability to appreciate the criminality of his conduct.[6] Given the substantiality of the evidence supporting this circumstance, the *McKoy* error cannot be deemed harmless.

Defendant was only twenty-six at the time Brenda Smith was killed. (Rpp. 2-3) Defendant's age at the time of the crime is a statutory mitigating circumstance. *See* N.C. Gen. Stat. § 15-2000(f)(7). Defendant's chronological age is not the determinative factor for finding this mitigating circumstance. *State v. Oliver*, 309 N.C. 326, 372, 307 S.E.2d 304, 333 (1983). A person's youth is relative requiring the jury to weigh this factor in light of varying conditions and circumstances. *State v. Johnson*, 317 N.C. 343, 393, 346 S.E.2d 596, 624 (1986); *Giles v. State*, 261 Ark. 413, 421, 549 S.W.2d 479, 483, *cert. denied*, 434 U.S. 894 (1977). Indeed, the Supreme Court of the United States noted that a defendant's age of twenty could constitute a mitigating factor to a capital jury. *Mills v. Maryland*, 486 U.S. 367, 380 n.14 (1988). The jury might have determined, based upon evidence of defendant's impaired mental capacity, his severe emotional disturbances, his low intellectual capacity, his mental retardation, and his history of institutionalization in psychiatric hospitals, combined to make his age a mitigating circumstance. The jury also had an opportunity to assess his demeanor and condition, both mental and emotional, at trial. "[E]vidence is not only what [jurors] hear on the stand but [is also] what they witness in the courtroom." *State v. Brown*, 320 N.C. 179, 199, 358 S.E.2d 1, 15, *cert. denied*, 484 U.S. 970 (1987). Given the evidence presented at trial regarding defendant's age, educational background, psychiatric history, drug-induced condition, mental retardation, limited intellectual capacity, and this Court's

[6] Even with the trial court's submission of defendant's inability to conform his conduct to the requirements of the law due to his mental illness, it also was necessary to submit defendant's impaired capacity to appreciate the criminality of his conduct due to his mental illness. The two parts of this statutory provision encompass separate facets of defendant's mental condition. The submission of only one part constitutes reversible error. *State v. Bacon*, 326 N.C. 404, 417-20, 390 S.E.2d 327, 334-36 (1990). This error provides an independent basis upon which to award defendant a new sentencing hearing.

inability to assess the defendant's demeanor [and other personal characteristics] from the written record," *McNeil*, 327 N.C. at 396, 395 S.E.2d at 111, it is impossible to say beyond a reasonable doubt that at least one juror could not have found this statutory mitigating circumstance. A juror could certainly have found it within the context of the catch-all provision.

Finally, defendant had worked at various jobs. His mother testified that he usually held more than one job at a time. (Tp. 1586) A reasonable juror could have found his steady, consistent employment to be a nonstatutory mitigating circumstance. This Court recently found evidence of a defendant's employment for a business constituted a possible nonstatutory mitigating circumstance. Given evidence supporting it, the Court was "unable to say beyond a reasonable doubt that no juror could reasonably have found this circumstance to exist and to be mitigating." *Id.* at 395-96, 395 S.E.2d at 111. Since a reasonable juror could have found this nonstatutory mitigating circumstance, the *McKoy* error cannot be deemed harmless.

Substantial evidence existed to support both the eight specified, statutory mitigating circumstances submitted and not found as well as various nonstatutory mitigating circumstances under the catch-all provision. This Court cannot confidently conclude "that no juror might find the mitigating circumstances, however weak, both to *exist* and to have *some* mitigating value." *Id.* at 396, 395 S.E.2d at 111. Certainly, "one or more jurors might have found and considered these additional mitigating circumstances and reached a different conclusion as to sentence." *Sanders*, 327 N.C. at 344-45, 395 S.E.2d at 428. Quite plainly, this case is not the "rare case in which a *McKoy* error [can] be deemed harmless." *McKoy*, 327 N.C. at 44, 394 S.E.2d at 433. Defendant must receive a new sentencing hearing.

B. The Polling Of The Jury Does Not Render The McKoy Error Harmless.

After its lengthy deliberations, the jury returned to the courtroom and announced it had reached a unanimous recommendation as to sentence. After the trial court determined the jury had recommended a sentence of death, the trial court directed the clerk to poll the jury individually.[7] (Tp. 2089) Upon defendant's request, the polling process involved an inquiry as to each aggravating and mitigating circumstance. (Tp. 2091) Despite the state's earlier claim that this polling established the nonprejudicial nature of the unconstitutional unanimity requirement, this Court did not rely upon this position in the previous appeal. *Price*, 326 N.C. at 93, 388 S.E.2d at 105; *but see id.* at 100, 388 S.E.2d at 109-10 (Frye, J., concurring). Likewise, the state urged the Supreme Court of the United States to deny certiorari because of the polling process, yet the court declined to do so.[8] And, contrary to the state's earlier claims, the poll does not conclusively show each juror personally rejected the unfound mitigating circumstances. The state cannot satisfy its burden, even with the jury poll, that the erroneous instructions "did not preclude at least one juror from considering one or more of these mitigating circumstances not unanimously found when weighing all the circumstances in the ultimate sentencing decision." *State v. Robinson*, 327 N.C. 346, 364, 395 S.E.2d 402, 412 (1990).

Analyzing the inadequacy of the jury poll to dispel the *McKoy* error begins with the trial court's charge to the jury. When he explained the second issue in the case, he told the jury:

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[7] In a capital case, the jury must be individually polled to establish each juror's agreement with the sentencing recommendation. N.C. Gen. Stat. § 15A-2000(b).

[8] The court unanimously issued a writ and remanded this case. *Price v. North Carolina*, 48 Crim. L. Rptr. 3016 (1990). Curiously, no justice dissented or expressed concern over this remand in stark contrast with the fierce disagreement in a similarly situated case. *See McNeil v. North Carolina*, 108 L.Ed.2d 756 (1990) (Kennedy, J., dissenting and expressing the views of three other justices).

> Issue Two is "Do you unanimously find from the evidence the existence of one or more of the following mitigating circumstances?"

(Tp. 2043) He then proceeded to instruct the jury as to each of the ten mitigating factors, including the nine specific mitigating factors and the catch-all provision. At the conclusion of his instructions on each mitigating circumstance, he told the jury:

> If you do not unanimously find this mitigating circumstance by a preponderance of the evidence, you will so indicate by having your foreman write no in that space.

(Tpp. 2046, 2047-48, 2049, 2050, 2051, 2052-53, 2054, 2055, 2056) These instructions plainly conveyed to the jury that the answer to each, individual mitigating circumstance must be "No" if there was a lack of unanimity with respect to the particular circumstance. In other words, unless all twelve jurors agreed that a particular mitigating circumstance existed, the answer would be "No."

Immediately upon the jury's announcement that it had arrived at a sentencing recommendation, the trial court instructed the clerk to take the recommendation, which occurred as follows:

> THE CLERK: Ladies and gentlemen of the jury, have you agreed upon your recommendation? The recommendation that shows that:
>
> "Issue One: Do you unanimously find from the evidence beyond a reasonable doubt the existence of one or more of the following aggravating circumstances? Answer: Yes."
>
> As to the aggravating circumstances, "Number 1: Had the defendant been previously convicted of a felony involving the use of violence to the person; to-wit: the conviction of murder arising

out of the death of Joan Brady which occurred October 18, 1984? Answer: Yes."

"(2) Was this murder part of a course of conduct in which the defendant engaged and did that course of conduct include the commission by the defendant of other crimes of violence against Elaine Clay, Robbie Davis, James Hardy and Tony Gammon? Answer: Yes."

"Issue Two: Do you unanimously find that the evidence of the existence of one or more of the following mitigating circumstances? Answer: Yes."

As to the mitigating circumstances, "Number 1: This murder was committed while the defendant was under the influence of mental illness or emotional disturbance. Answer: No."

"(2) The capacity of the defendant to conform his conduct to the requirements of the law was impaired by low intelligence: Answer: No."

"(3) The capacity of the defendant to conform his conduct to the requirements of the law was impaired by manic-depressive illness. Answer: No."

"(4) The capacity of the defendant to conform his conduct to the requirements of the law was impaired by schizophrenic illness. Answer: No."

"(5) The capacity of the defendant to conform his conduct to the requirements of the law was impaired by emotional instability. Answer: No."

"(6) The capacity of the defendant to conform his conduct to the requirements of the law was impaired by drug use. Answer: No."

"(7) The capacity of the defendant to conform his conduct to the requirements of the law was impaired by drug-induced mental illness. Answer: No."

"(8) The capacity of the defendant to conform his conduct to the requirements of the law was impaired by mixed personality disorder. Answer: No."

"(9) The defendant's family has a history of mental illness or emotional disturbance. Answer: Yes."

"(10) Any other circumstance or circumstances arising from the evidence which you, the jury, deem to have mitigating value. Answer: No."

"Issue Three: Do you unanimously find beyond a reasonable doubt that the mitigating circumstance or circumstances found by you, is or are, insufficient to outweigh the aggravating circumstance or circumstances found by you? Answer Yes."

"Issue Four: Do you unanimously find beyond a reasonable doubt that the aggravating circumstance or circumstances found by you is, or are, sufficiently substantial to call for the imposition of the death penalty when considered with the mitigating circumstance or circumstances found by you? Answer: Yes."

The recommendation is "we, the jury, unanimously recommend that the defendant, Ricky Lee Price, be sentenced to death."

This is your recommendation, so say you all?

THE COURT: If this is your recommendation, so say you all, raise your right hand.

Let the record reflect that each and every juror has raised his or her right hand.

(Tpp. 2086-89) As the record reflects, all twelve jurors raised their hands indicating assent to all of the answers on the Issues and Recommendation form, including the negative answers to nine of the ten mitigating circumstances. At this juncture, the trial court directed that the jury be polled individually. (Tp. 2089) The clerk proceeded to conduct this poll by reading each finding with the jury's answer and then seeking each individual juror's assent. (Tpp. 2091-2153) For example, the clerk addressed the first juror as follows with respect to the first mitigating circumstance:

As to the mitigating factors, "Number 1: This murder was committed while the defendant was under the influence of mental illness or emotional disturbance. Answer: No." Is that your answer?

(Tp. 2093) When the juror responded affirmatively, the clerk then asked him "do you still assent thereto?"

A reasonable likelihood arose from these instructions that an individual would understand that her answer to a specific mitigating circumstance must be "No" unless the entire jury agreed that this mitigating circumstance was proved by a preponderance of the evidence. *See Boyde v. California*, 494 U.S. ___, 108 L.Ed.2d 316 (1990). In the context of the entire charge, a reasonable juror would be hard pressed to understand the challenged instructions to mean that a negative finding of a particular mitigating factor would not be *her* answer if the jury could not unanimously agree that the mitigating factor existed. "Jurors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the way lawyers might. [A] common sense

understanding of the instructions in light of all that has taken place at the trial is likely to prevail over technical hairsplitting." *Id.* at 329. This understanding is particularly appropriate in this case where an individual juror was responding to a question without opportunity for deliberation or discussion with respect to its meaning.

The trial court instructed the sentencing jury on at least ten occasions that it *must* answer "No" to a mitigating circumstance if the jury did not agree unanimously as to its existence. There was no suggestion that each juror could have a different ultimate answer to a particular mitigating circumstance. There could be only one answer for the entire jury. A reasonable juror would have understood this instruction to mean that the jury's negative answer and, hence, her negative answer to any particular circumstance depended on the absence of a unanimous agreement that the circumstance had been proved by a preponderance of the evidence. If a juror so understood the instructions, then *her* answer to a mitigating circumstance would be "No" if the jury failed to agree unanimously as to the existence of this circumstance. Under these conditions, an individual juror's assent to the "No" answer during the poll would simply indicate her agreement that the jury failed to find this circumstance unanimously, not that *she* would have failed to find it she were free to make her own individual determination.

Quite simply, a reasonable juror would have understood the poll to query whether the answers on the issue sheet were the jury's answers. The question asked if a particular answer was "your answer." At each point in the trial when the judge used the word "you" or "your," he referred to the entire jury not to individual jurors. The jury was impaneled with this pronoun collectively; the trial court addressed the jury collectively with this pronoun; and he used the pronoun collectively to frame all of the sentencing issues. Each juror would have understood this question to address whether the answer

to a given mitigating factor was *the jury's* answer. An individual's assent to any answer on the issue sheet means no more than she agrees that the answer was that of the jury.

Each juror would have understood the instructions to mean that the only answer to a mitigating factor was "No" if the jury failed to find it unanimously. When that juror then responded affirmatively to the above polling inquiry, she may reasonably be saying: "Yes. The jury has failed to agree unanimously as to the existence of this mitigating factor." Under such an interpretation, the polling process does not prove the absence of *McKoy* error or that any such error is harmless. Contrary to the state's position, the present record does not conclusively show that each of defendant's jurors rejected the nine unfound mitigating factors.

This Court has recognized that the inquiry is "whether there is a 'reasonable likelihood' that the jury here believed it was required to apply 'the challenge instruction in a way that prevents the consideration of constitutionally relevant evidence.'" *McNeil*, 327 N.C. at 392, 395 S.E.2d at 109 (relying upon the *Boyde* standard). "[A] single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge." *Cupp v. Naughten*, 414 U.S. 141, 146-47 (1973). The polling process below, therefore, cannot be examined in isolation, but in view of the overall charge. In light of everything defendant's jury heard, a reasonable juror could well have understood the polling inquiry to be whether her answer was "No" because the jury was not unanimous as to the existence of a particular mitigating circumstance.[9]

The jury poll in this case simply does not satisfy the state's burden of demonstrating that the *McKoy* error was harmless beyond a reasonable doubt. "[W]hen

[9] Although this Court has said a *McKoy* error might be deemed harmless in certain circumstances, it did not include a case in which the jury was polled individually as to each mitigating circumstance as "a candidate for successful argument that a *McKoy* error was harmless . . . ." *State v. McKoy*, 327 N.C. 31, 44 n.4, 394 S.E.2d 426, 433 n.4 (1990).

viewed in the context of the overall charge, there is a reasonable likelihood that the jury interpreted the instructions here" in a manner that prevented an individual juror "from considering constitutionally relevant evidence." *McNeil*, 327 N.C. at 392, 395 S.E.2d at 109. Since the state cannot satisfy its heavy burden, defendant must receive a new sentencing hearing.

CONCLUSION

For the reasons stated herein, defendant respectfully requests that this matter be remanded for a new sentencing hearing.

This the 5th day of November, 1990.

Respectfully submitted,

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Assistant Appellate Defender

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ATTORNEYS FOR DEFENDANT

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allowed to ask other questions which should have enabled him to determine if challenges should have been made on this ground. The court instructed the potential jurors as to the method of finding aggravating and mitigating circumstances and the consequences of doing so. The defendant was then allowed to question the jurors as to their ability to follow the court's instruction in regard to these circumstances and apply the law according to the instructions. This should have enabled the defendant to determine whether to challenge a juror on the ground he would automatically vote for the death penalty if the defendant was found guilty.

If the refusal to allow the excluded questions was error, it was harmless beyond a reasonable doubt. N.C.G.S. § 15A-1443(b) (1988). The case is remanded to the Superior Court, Person County, for further proceedings.

DEATH SENTENCE AFFIRMED; MANDATE REINSTATED; CASE REMANDED.

STATE of North Carolina

v.

Robert Archie CLEMMONS, Jr.

No. 9218SC78.

Court of Appeals of North Carolina.

Aug. 17, 1993.

Defendant was convicted in the Superior Court, Guilford County, W. Russell Duke, Jr., J., of obtaining property by false pretenses and transacting business in securities without being licensed or registered in violation of North Carolina Securities Act. Defendant appealed. The Court of Appeals, Eagles, J., held that: (1) defendant did not "transact business" within meaning of Securities Act, and (2) court was not required to instruct jury on specific misrepresentation as alleged in indictment.

Reversed and remanded in part, affirmed in part, vacated in part.

1. Securities Regulation ⇐192

Defendant did not "transact business," for purposes of section of Securities Act prohibiting unregistered persons from transacting business as dealer or salesman, where defendant misrepresented to victims that he had invested their money in stock options when, in fact, he never purchased stock options and where state's evidence showed only that defendant gave victims false impression that he was "broker" or "licensed broker"; statute prohibits transacting business without being registered, not offering to transact business without being registered. G.S. § 78A-36(a).

See publication Words and Phrases for other judicial constructions and definitions.

2. Securities Regulation ⇐195

Evidence that defendant advised victims, for 10% commission, to invest in securities of corporations and that defendant told victims that value of these securities would increase by various amounts in future, promising extravagantly large returns on their original investment, would support indictment under statute prohibiting person who receives consideration for advising another person as to value of securities or their purchase from defrauding other person, or engaging in acts that operate as fraud or deceit upon other person. G.S. § 78C-8.

3. Criminal Law ⇐814(6)
False Pretenses ⇐38

Although jury was not instructed on specific misrepresentation alleged in indictments charging obtaining property by false pretenses, there was no fatal variance between indictment, proof, and instruction, where state's evidence showed that defendant obtained property (victims' money) by false pretenses (statements that defendant was "broker" or "licensed broker" and that their money would
options). G.S. § 14-

4. Criminal Law ⇐

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Challenge for cause Juror Number 1, Mrs. Clayton, respectfully, and challenge for cause respectfully also the feelings of Juror Number 10, Mrs. Sanford.

THE COURT: Mrs. Clayton and Mrs. Sanford are with the defense for the limited issue.

MR. GALLOWAY: Thank you, Judge.

Mrs. Clayton, let me ask you some more question about the death penalty matter and that alone. If this trial gets to that point, the Judge will instruct you on the death penalty issue. In other words, this would only be after a verdict were to be returned with regard to first degree murder. Only after a first degree murder verdict had been returned would the Judge instruct you, and the Judge would instruct you that before the jury could return the death penalty that the jury would have to consider certain aggravating circumstances and would not be an automatic matter of imposing the death penalty, but you would be then directed to consider whether there were extra aggravating circumstances over and above the fact that a first degree murder had been convicted -- that a first degree murder had been committed.

So I am asking you now, are there any circumstances, any aggravating circumstances where

under any circumstances at all you might consider that a person was guilty of first degree murder might should have the death penalty imposed? Are there some circumstances that are so bad that you would consider imposing the death penalty?

MRS. CLAYTON: Might be.

MR. GALLOWAY: You think that there might be some such circumstances?

MRS. CLAYTON: Yeah.

MR. GALLOWAY: Okay. Let me ask Mrs. Sanford, remembering what I just told Mrs. Clayton about the Judge instructing you on the second phase and the Judge would instruct you that you would return a verdict of death only if there were certain aggravating factors over and above the fact that a first degree murder had been committed, only then if you were satisfied of the aggravating circumstances and other instructions, would you consider imposing the death penalty?

MRS. SANFORD: No.

MR. GALLOWAY: So what I am asking you is this. Are there any circumstances at all that you could conceive of under any circumstances that you might think that you would be -- that the death penalty would be appropraite?

MR. BREWER: Objection, State vs. Bracey,

303 N.C., 112.

THE COURT: Approach the bench.

(Side-bar conference was held by the Court, Mr. Brewer, Mr. Galloway, Mr. Currin and Mr. Tolin.)

THE COURT: Objection is sustained. You may rephrase the question.

MR. GALLOWAY: Mrs. Sanford, I am not asking you to conceive of any circumstances -- to say what the circumstances might be, but I'm asking you are there some circumstances under which you think that a first degree murder would be so heinous or so horrible that you would feel that the death penalty would be appropriate punishment? Do you think that there might be some circumstances that are that aggravated?

MRS. SANFORD: Well, because of my type of religion, I feel that nobody should kill another human being even though, like I say, sometimes it does happen. But I still feel like no person should take another person's life.

MR. GALLOWAY: Okay. And I thank you.

Mrs. Clayton, the Judge would instruct you that there would be aggravating circumstances that you were to consider, and he would tell you what those circumstances might be. And then again, this

is in the second phase of the trial if we reach that. Then after that, the Judge would allow you to consider certain mitigating circumstances if the facts are there. And so then it would be your job -- this is after the first degree murder verdict has been returned, it would be your job to determine has the State satisfied you beyond a reasonable doubt that there are these aggravating circumstances, and then you would consider the mitigating circumstances, and after you have considered those circumstances, then you would decide whether or not the aggravating circumstances would outweigh the mitigating circumstances, and then and only then would you be to the point of deciding to vote for or against the death penalty. So with that in mind, do you feel that --

MR. BREWER: Objection to statement of law by counsel as not being a complete statement.

THE COURT: Sustained.

MR. GALLOWAY: Would the Court wish to give an instruction at this time?

THE COURT: All right. Ladies and gentlemen of the jury, this second proceeding which I will refer to as the sentencing proceeding, is only reached if at the first proceeding, which I'll call the guilt or innocence proceeding, the jury should find the

defendant guilty of first degree murder.

Now, if the second proceeding is reached, the sentencing proceeding, the law provides that it is the duty of the jury to recommend that the defendant be sentenced to death if the State satisfies the twelve jurors beyond a reasonable doubt of three things. First, that one or more of the aggravating circumstances set forth by statute, that is, by law exist. Second, that any mitigating circumstance or circumstances found to exist is or are insufficient to outweigh the aggravating circumstance or circumstances found. And third, that the aggravating circumstance or circumstances are sufficiently substantial to call for the imposition of the death penalty when considered with any mitigating factor or factors found by the jury to exist. If the State fails to satisfy the jury of all of these three things beyond a reasonable doubt, it is the duty of the jury to recommend life imprison.

You may proceed with further questions.

MR. GALLOWAY: Thank you, Judge.

Mrs. Clayton, with that in mind, and bearing in mind that the death penalty phase will deal with the aggravating circumstances, do you understand -- do you understand that? If there is something about that that you don't understand or for that matter

would leave you to say yes, in this case death is appropriate?

MR. PIERCE: Yes, sir.

MR. GALLOWAY: Okay. Now, earlier the Judge gave you instructions to the panel at the time that you were seated out here.

MR. PIERCE: Yeah.

MR. GALLOWAY: I will endeavor as best I can to recall that to you, but the idea is that the Court will allow you to consider certain aggravating factors and the State must satisfy you of these aggravating factors beyond a reasonable doubt before you would go on. Do you understand that?

MR. PIERCE: Yes, sir.

MR. GALLOWAY: Now, if there is anything that I am telling you that you don't understand or that you want to ask me about, please say so, because this is your chance to talk to us.

MR. PIERCE: Yeah.

MR. GALLOWAY: Okay. Then after the State has shown you or has put forth aggravating circumstances and after you have decided whether or not you believe them beyond a reasonable doubt, then you would consider are there any mitigating circumstances. In other words factors that would lead you to say, well, maybe

I should not impose the death penalty, and those are factors that will come out of the evidence or the lack of the evidence; you understand that?

MR. PIERCE: Yeah, I understand.

MR. GALLOWAY: In other words, aggravating factors are the ones that lead you to want to impose the death penalty; mitigating on the other side.

MR. PIERCE: Yeah.

MR. GALLOWAY: And then you would weigh those and only after have done that would you be in the position of deciding should I vote to impose the death penalty; do you understand that?

MR. PIERCE: Yeah, I understand.

MR. GALLOWAY: Under that scheme of analyzing things, do you think that there are circumstances in which you could consider imposing the death penalty, and I'm not asking you to say what the circumstances are, but are there circumstances where you could do that?

MR. PIERCE: Yes, sir.

MR. GALLOWAY: Okay. And so earlier you said that -- earlier you said that you -- strike that. I'm trying to understand what you were saying. If I'm understanding your position, you were taking the position that you really did not want the Judge

to tell you this was or was not a death penalty case; is that what you were saying?

MR. PIERCE: Yes, sir.

MR. GALLOWAY: And what you were saying is that you want to have the right to require the State to prove not only this a first degree murder, but you want to require the State to prove that these are aggravating circumstances --

MR. PIERCE: That's exactly what I am saying.

MR. GALLOWAY: And you want the State to prove that to you beyond a reasonable doubt?

MR. PIERCE: That's the only way I would go for the death.

MR. GALLOWAY: Okay. And once the State has done that, then you would consider the mitigating circumstances also, wouldn't you?

MR. PIERCE: Yes, sir.

MR. GALLOWAY: And having done that, you would then -- you would at that point, you would consider is this a death case or is it not?

MR. PIERCE: Yes, exactly.

MR. GALLOWAY: Okay. Now, have I -- have I correctly stated your feelings about it?

MR. PIERCE: Yeah.

THE COURT: Just for clarification, let me interject, the word bifurcated means two parts.

MR. TOLIN: Assuming that this is the law, ma'am, do you feel that the only appropriate penalty for first degree murder is the death sentence or would you require the State to show additional aggravating factors, ma'am?

MR. BREWER: Objection.

THE COURT: Sustained as to the form of the question.

MR. TOLIN: Before you would vote for the death penalty, would you require the State to show beyond a reasonable doubt additional aggravating factors other than the fact that there has been a conviction of first degree murder?

MR. BREWER: Objection.

THE COURT: Sustained.

Ladies and gentlemen of the jury, the second proceeding is only reached if the defendant is found guilty of first degree murder. If that should occur, then the law provides that it is the duty of the jury to recommend in a separate proceeding that the defendant be sentenced to death if the State satisfies the twelve jurors beyond a reasonable doubt of three things. First, that one or more of the aggravating

PUBLISHER'S NOTE:

Page(s) 54 missing in original.

MR. GALLOWAY: Will you have any difficulty in following that?

MR. CROMARTIE: No.

MR. GALLOWAY: Mr. Paylor, do you believe that you could require the State to prove aggravating factors over and above first degree murder before you would vote for the death penalty?

MR. PAYLOR: Yes.

MR. GALLOWAY: And you would consider the defendant's mitigating circumstances?

MR. PAYLOR: Yes, sir.

MR. GALLOWAY: Mr. Clayton, I'll not restate the question, but can you follow those instructions?

MR. CLAYTON: Yes, sir.

MR. GALLOWAY: And Mr. Jones?

MR. JONES: I think so.

MR. GALLOWAY: Okay. Mr. Royal?

MR. ROYAL: Yes.

MR. GALLOWAY: Mr. Ragland?

MR. RAGLAND: Yes, sir.

MR. GALLOWAY: Mr. Day?

MR. DAY: Yes, sir.

MR. GALLOWAY: Any of you -- I know I've come by you quickly, but you've heard what I told all the other jurors and the questions I've asked.

Are there any questions that you have, any reactions that you have about the questions that I asked them that I did not ask you?

MR. CLAYTON: Sir --

MR. GALLOWAY: Yes, sir.

MR. CLAYTON: May I ask one question in regards to the Judge's statement a minute ago regarding mitigating circumstances, did I understand you, sir, to say that they would not have to be proven beyond a reasonable doubt?

THE COURT: That is correct.

MR. CLAYTON: Whereas the aggravating circumstances would have to proven beyond a reasonable doubt?

THE COURT: The burden of proof upon the State is to prove aggravating circumstances beyond a reasonable doubt.

MR. CLAYTON: Right, but mitigating would not be required to be proven beyond a reasonable doubt?

THE COURT: That is correct.

MR. CLAYTON: That's the way I understood it. I just wanted to be sure.

THE COURT: And the jury can consider all of the evidence in determining whether a mitigating

MR. TOLIN: How about you, Mr. Newton, as to requiring the defendant to show mitigating factors? Do you understand mitigating factors? You understand the scheme of this? Would you require him to show mitigating factors before you would consider voting for life imprisonment instead of the death penalty?

MR. NEWTON: I think I would.

MR. TOLIN: You think you would, sir?

(Mr. Newton nods head.)

MR. TOLIN: Is this because you feel, Mr. Newton, on a first degree murder case that death was the only proper penalty?

MR. BREWER: Objection.

THE COURT: Overruled. You may answer that question.

MR. NEWTON: Ask the question again.

MR. TOLIN: I said is the basis of your previous answer that you would require the defendant to give you mitigating factors, is the basis of that answer that you feel that the death penalty is the only proper punishment where there has been conviction of first degree murder?

MR. NEWTON: No.

MR. TOLIN: You do not feel that is the basis?

MR. NEWTON: No.

MR. TOLIN: How about you, Mrs. Long?

MRS. LONG: No.

MR. TOLIN: So you feel that life imprisonment would be an appropriate sentence in some first degree murder cases?

(Mrs. Long nods head.)

MR. TOLIN: How about you, sir?

MR. NEWTON: Me?

MR. TOLIN: Yes.

MR. NEWTON: Yes.

MR. TOLIN: Okay. I'm talking to both of you at one time. I apologize for that.

Ms. Bowes, you have heard the questions about the life sentence or the death penalty, do you feel that the death penalty is the only appropriate sentence in first degree murder convictions?

MS. BOWES: I think so.

MR. TOLIN: You would never vote for life imprisonment?

MS. BOWES: No.

MR. TOLIN: How about you, Mr. Leathers? What's your thoughts about this question, sir?

MR. LEATHERS: I don't know, sir.

MR. TOLIN: Would you like me to ask

the question again, sir?

MR. LEATHERS: Yes, sir.

MR. TOLIN: Do you feel that the death penalty is the only appropriate punishment for first degree murder or in some situations would you agree that a life imprisonment would be appropriate?

MR. LEATHERS: Well, I don't really think that the death sentence is really appropraite on some occasions.

MR. TOLIN: All right, sir.

Mrs. Clayton, how do you feel about this issue?

MRS. CLAYTON: I think the death penalty is the appropriate for some, but I think you also have to consider life imprison on the circumstances.

MR. TOLIN: Mrs. Clack?

MRS. CLACK: I feel that sometimes life imprison would serve better than the death penalty.

MR. TOLIN: Mrs. Bowes, you have indicated that you -- I don't mean to put words in your mouth, ma'am, so if I am wrong, you correct me. But you have indicated that you feel in all first degree murder cases that the death penalty is the appropriate -- is the punishment that should be inflicted?

MS. BOWES: Yes.

MR. TOLIN: Do you feel this way even after what the Judge has charged you with what the law is, ma'am?

MS. BOWES: Pardon?

MR. TOLIN: Do you still feel that way even though the Judge has told you that in some cases life imprisonment is the proper punishment?

MS. BOWES: Yes, I do.

MR. TOLIN: Do you think you would continue to adhere to your beliefs concerning that even after you have been charged as to the law later by the Judge, ma'am?

MS. BOWES: Repeat the question.

MR. TOLIN: Do you think that you would continue to adhere to your strong beliefs concerning the death penalty even after the Judge had charged you as to the law concerning this matter, ma'am?

MS. BOWES: I don't know.

MR. TOLIN: Do you think your beliefs about the death penalty would substantially impair your being able to follow the law as the Judge would give it to you, ma'am, if it were different from what your basic beliefs are?

MS. BOWES: No, I don't think so.

MR. TOLIN: If I may, Mrs. Clack, direct

MR. TOLIN: Your Honor, we would challenge for cause Mrs. Bowes based upon her views of the death penalty.

THE COURT: Mrs. Bowes, do you understand that the second phase is only reached if the defendant if found guilty of first degree murder?

MS. BOWES: Right.

THE COURT: If that stage is reached, it will be the duty of the jury to listen to the evidence presented at that time, listen to the arguments of the attorneys and the Court's instruction as to the law, and it will be the duty of the jury to follow the law in the proceeding. The law calls for the jury to make a recommendation to the judge of death or life. If that proceeding is reached, can you follow the law at that time and consider the law as it is given to you in determining whether to recommend death or life?

MS. BOWES: Yes, I could.

THE COURT: You have stated earlier that your personal belief is that death is the only appropriate sentence --

MS. BOWES: Yes.

THE COURT: -- in a first degree murder case?

MS. BOWES: Yes.

THE COURT: Can you set that aside and dismiss it from your mind if the second proceeding is reached where upon the jury would be called upon to make a recommendation of death or life?

MS. BOWES: I think I could.

THE COURT: I did not hear you, ma'am.

MS. BOWES: I feel like I could.

THE COURT: All right. Would your personal belief in any way substantially impair your ability to follow the law?

MS. BOWES: I would hope not.

THE COURT: You may ask further questions.

MR. TOLIN: Your Honor, we have no further questions.

THE COURT: I have one other question for you. Are you related by blood or marriage to someone in the Person County Sheriff's Department?

MS. BOWES: Yes.

THE COURT: Is that person in the courtroom now?

MS. BOWES: Yes.

THE COURT: All right. Will the attorneys approach the bench.

(Side-bar conference was held by the

of you individually, starting with Mr. Painter, if this question were to be put to you, sir, do you think that simply because he was convicted of first degree murder that in itself would you be inclined to vote for the death penalty and not possibly life imprisonment, sir?

MR. PAINTER: I would to the best of my knowledge.

MR. TOLIN: Are you saying that you would always vote for the death penalty in that situation, sir?

MR. PAINTER: No, not necessarily, no, sir.

MR. TOLIN: Okay. In some circumstances you would vote for life imprisonment?

MR. PAINTER: Yes, sir.

MR. TOLIN: What's your feelings about this matter, Mr. Hutchins?

MR. HUTCHINS: No. That it could be either way.

MR. TOLIN: Do you think there are some cases here you would feel that life imprisonment was a proper punishment, sir?

MR. HUTCHINS: Yes, sir.

MR. TOLIN: Mr. Long, how about you,

which -- if you don't get past it then I think the Judge will probably tell you and other members of the jury that you can find one of several things. You can find this man not guilty if you're convinced he's not guilty by being tried. You can find him guilty of probably second degree murder and possibly first degree murder. It's only of course that if he is found guilty of first degree murder that you go into the second phase of the trial being the sentencing phase where you consider either life -- recommendation of life imprisonment or the death penalty. If we go into that second phase and you are sitting here as a member of the jury panel, do you feel that you could in some circumstances, depending upon the evidence, return a verdict of life imprisonment or would you in your own mind feel that you would have to at any time that you reach that last stage where he has been convicted of first degree murder that you would have to return a verdict to impose the death penalty? How do you feel about that, ma'am?

MRS. SCOTT: You don't have to return the death penalty.

MR. TOLIN: You think there are some circumstances where life imprisonment would be the proper verdict?

MS. O'BRIANT: Yes, sir.

MR. TOLIN: And if the jury were the -- if you were sitting on the jury and if you were to return a verdict of first degree murder, would you be inclined to say that simply because of that that the appropriate punishment would be the death penalty or in some situations would you vote for life imprisonment?

MS. O'BRIANT: Life in prison in some situations.

MR. TOLIN: Your Honor, we think that we will have Mrs. O'Briant excused, sir, so that -- turn you over to your child so you do not have a three-week trial --

THE COURT: I'm sorry, I did not hear you --

MR. TOLIN: I said we would like to have her excused, sir.

THE COURT: All right. Excused by the defense. You may step down.

We'll stop at this time for an overnight recess. At this time, ladies and gentlemen of the jury, I'd like to again give you your duties during this and any other recess, not because I think that you don't remember them, but rather to re-emphasize their importance to you.

MRS. CRUMPTON: Uh-huh.

MR. TOLIN: And I have one for you that I think is equally important, and that is, do you feel in your own mind that there are some cases that a true verdict would be the death penalty and other cases where a true verdict would be life imprisonment, or do you feel that in all cases where the jury goes out on a decision as to punishment that they should always return with a death penalty on a first degree murder conviction? How do you feel about that, ma'am?

Did you understand my question?

MRS. CRUMPTON: Yes, I understand. I heard it yesterday. Circumstances -- evidence -- it would have to be presented to go either way.

MR. TOLIN: You don't have any preconceived idea that you should always return the death penalty?

MRS. CRUMPTON: No.

MR. TOLIN: Your Honor, I think we would like to excuse Mrs. Crumpton, please.

THE COURT: All right. Mrs. Crumpton, you have been excused by the defense. You may step down.

At this time, Madam Clerk, I am going to ask that you call the roll of jurors who were first summonsed to be here this morning.

MR. OAKLEY: I wouldn't hold it against him.

MR. TOLIN: Just based on that fact you would not, sir?

MR. OAKLEY: No.

MR. TOLIN: You understand the two-part trial? We've discussed that at length. I'm sure you have heard many comments about it. If he is found guilty of first degree murder, which of course is one of the many verdicts that you can come back with. Of course it goes to the jury for consideration of punishment, life or death. And Mr. Brewer, of course, has asked you questions about this. And I'm just wondering how you feel -- if a man is convicted of first degree murder, do you believe that he should always have the death penalty?

MR. OAKLEY: Not necessarily. Depends on what --

MR. TOLIN: Would you agree to consider the mitigating -- consider all the factors, and do you think in some situations life imprisonment is appropriate?

MR. OAKLEY: Yes, sir.

MR. TOLIN: Mr. Oakley, under the law concerning the death penalty, the second part of the

trial if in fact the jury returns a death penalty verdict, the State is required among other things to show beyond a reasonable doubt aggravating factors. Would you require them to show aggravating factors beyond a reasonable doubt before you could -- would vote for the death penalty?

MR. OAKLEY: Yes, sir.

MR. TOLIN: Mr. Oakley, have you or your family ever had any dealings -- where you were on the other side of a matter, litigation, with either Mr. Calloway's firm including Mr. Hubbard or Mr. Cates, or me or my firm which would be myself and Mr. Long, bad or good with our firms?

MR. OAKLEY: No, sir.

MR. TOLIN: You've had no dealings with us period; is that correct, sir?

MR. OAKLEY: Yes, sir.

MR. TOLIN: Mr. Oakley, if the defense were to put on psychiatrist or psychologists who testified, would you discount this testimony simply because they were psychiatrist or psychologist?

MR. OAKLEY: No, sir, I wouldn't disregard it.

MR. TOLIN: Sir?

MR. OAKLEY: No, sir.

(Mrs. Winstead nods head.)

MR. TOLIN: There are other possible verdicts, and if any of the other possible verdicts come in by the jury, then that's the end of the case as far as the jury is concerned. But if the jury returns a verdict of first degree murder, then the jury has to go back and reconsider whether to -- the death penalty or life imprisonment should be imposed; you understand that?

MRS. WINSTEAD: Yes, sir.

MR. TOLIN: And do you feel that if the jury is sent out for consideration of punishment, if the conviction is for life -- for the death -- I'm sorry, for first degree murder, do you feel in that situation that the punishment should be death period or do you think in some situations that life imprisonment is appropriate punishment for first degree murder?

MRS. WINSTEAD: The answer is yes, it would be considered.

MR. TOLIN: Okay. You would consider in your deliberations under some circumstances that life imprisonment would be the appropriate punishment?

MRS. WINSTEAD: I would say that it would be.

MR. TOLIN: Yes, ma'am. Is that what you are saying?

MRS. WINSTEAD: Yes, sir.

MR. TOLIN: Before you as a juror would be able to say that he should have the death penalty, would you require the State to put on evidence beyond a reasonable doubt of aggravating factors?

MRS. WINSTEAD: Yes, sir.

MR. TOLIN: And would you feel -- if they didn't would you feel that life imprisonment should be the appropriate punishment?

MRS. WINSTEAD: Yes, sir.

MR. TOLIN: Your Honor, we would ask that Mrs. Winstead be excused, and we apologize for all the questions.

THE COURT: Beg your pardon?

MR. TOLIN: We apologize for all of the questions that we asked.

THE COURT: You are excused and you may step down.

We are going to take a fifteen minute recess right now. Ladies and gentlemen, during the recess do not discuss this case among yourselves or with anyone else. Do not allow anyone to discuss it with you or in your presence. Form no opinion

put on aggravating evidence and of course we can put on mitigating evidence. How do you feel about the death penalty in this type of thing? Do you think that just the mere fact that a person has been convicted of first degree murder that he should automatically receive the death penalty or do you think in some situations that life imprisonment is the appropriate punishment?

MS. CARVER: Well, I really think that under some circumstances they should get life in prison and some they should get the death penalty. Until you hear all the evidence and things like that, you don't --

MR. TOLIN: You don't know. I understand. Ma'am, before you could vote for the death penalty would you require the State to put on proof beyond a reasonable doubt of aggravating factors?

MS. CARVER: Yes, I would.

MR. TOLIN: Your Honor, could we approach the bench, sir?

THE COURT: Yes, sir.

(Side-bar conference was held by the Court, Mr. Galloway, Mr. Brewer, Mr. Currin and Mr. Tolin.)

MR. TOLIN: Your Honor, we would ask that Mrs. Carver be excused, please.

where you think life is proper or do you think death is the only punishment --

MRS. CLAYTON: No, I don't think it is.

MR. TOLIN: -- that should be given in this situation?

MRS. CLAYTON: No, I don't think so.

MR. TOLIN: You understand that the State of North Carolina is required to present aggravating circumstances that you must believe beyond a reasonable doubt before you can return the death penalty? Do you understand that, ma'am?

MRS. CLAYTON: Yes.

MR. TOLIN: Would you require them to do so?

MRS. CLAYTON: Yes.

MR. TOLIN: Your Honor, we are satisfied with Mrs. Clayton as an alternate juror.

THE COURT: Now, ladies and gentlemen, twelve of you have been selected and two alternates selected by the State and the defendant to try this case. Before we go further, I must ask you this. Do any of you have any physical condition that you think it's appropriate to bring to the Court's attention at this time concerning your ability to sit and listen

psychiatric testimony?

MS. CRAWLEY: No, sir.

MR. TOLIN: There's a good likelihood that Mr. Price will not testify in this trial. Would you consider this as indication of his guilt because he does not testify?

MS. CRAWLEY: No, sir.

MR. TOLIN: You wouldn't expect him to testify?

MS. CRAWLEY: No, sir.

MR. TOLIN: Okay. Looking at the second phase of this trial that may come about, Ms. Crawley, you understand that of course there are other verdicts, of course, that the jury could come back with, not guilty, second degree murder, but -- and if they come back with those verdicts or other verdict that the Judge may charge on, that the jury would not go in for a second deliberation. But if the jury decided that Mr. Price was guilty of first degree murder then they would go back and deliberate punishment, and their two options would be recommendation of life imprisonment or recommendation of death penalty. Do you believe that the mere fact that he is charged or would be convicted of first degree murder, if that in itself is sufficient reason to have the death penalty

or would you require other factors -- other aggravating factors to be presented before you would vote for the death penalty?

MS. CRAWLEY: Aggravating factors.

MR. TOLIN: You think there are some situations where life imprisonment would be the appropriate punishment?

MS. CRAWLEY: Yes, sir.

MR. TOLIN: For the crime of first degree murder?

MS. CRAWLEY: Yes, sir.

MR. GALLOWAY: May we approach the bench?

THE COURT: Yes, sir.

(Side-bar conference was held by the Court, Mr. Tolin, Mr. Brewer, Mr. Currin and Mr. Galloway.)

MR. TOLIN: Your Honor, we would ask that Ms. Crawley be excused.

THE COURT: You have been excused by the defense. You may step down.

Madam Clerk, call an alternate juror.

THE CLERK: Gertrude B. Wilson.

THE COURT: Ms. Wilson, you have been here since yesterday morning; is that correct?

MS. WILSON: Yes, sir.

THE COURT: Do you know the defendant,

MS. VAUGHAN: Yes.

MR. TOLIN: You would have trouble doing that?

MS. VAUGHAN: No, I wouldn't have any trouble.

MR. TOLIN: Okay. Ms. Vaughan, you are aware, I'm sure you have been told, concerning the fact that there are several verdicts that the jury may come back with, possibly a not guilty plea, second degree murder, possibly other verdicts, and of course the worst verdict would be a first degree conviction. And you understand that only if they come back with first degree -- a first degree conviction that it would go back to the jury for a second decision as to punishment; do you understand how that process works?

MS. VAUGHAN: Yes.

MR. TOLIN: I think you've heard much about it sitting in here. I'm sure.

MS. VAUGHAN: Yes.

MR. TOLIN: Of course you understand you could -- the jury could either come back with a recommendation of life imprisonment or death penalty. Assuming that there was -- let me ask you -- I'll rephrase that. Would you require the State to show

PUBLISHER'S NOTE:

Page(s) 76 missing in original.

case is to -- to do a part. Everyone -- every part of this court proceeding has a particular function. The State's is to present evidence for conviction. Ours is to present evidence for acquittal or for mitigation. The Judge's is to keep us lawyers in line and to instruct you on the law, and yours is to find the facts. Law enforcement's position is to help the D.A. in marshalling the evidence. So everyone has a function in this trial. And what we are trying to do is to arrive at our feelings about who can best serve that function, and who can best render a verdict based on the instructions that the Judge will give you and based on the principles of law that will apply.

I am going to ask you some questions about the sentencing phase of this case should it be reached. We're on -- we're on the horns a dilemma when we ask you about that because we contend that you should not reach that phase of the case. We are contending that he should be found not guilty or in the alternative, he should be found guilty of a lesser offense of second degree murder. And we are contending from the outset that the -- the sentencing phase of this trial should not be reached. And you remember from the Judge's instructions that you will reach the guilt -- I'm sorry. You will reach the life or

death question only if you have found or the jury finds the defendant guilty of first degree murder, that is, premeditated murder. Still I am going to ask you some questions about the -- about the death phase in the event that that phase should be reached. Please understand that we are contending that that stage should not be reached.

I want -- I'm not asking you to state an opinion about what you would do on a particular bit of evidence. I do not want your opinion and I do not want to stake you out, but we do have a certain type of evidence which we would ask you to consider at the guilt phase. This is a type of evidence which some people are just predisposed not to believe in. And we would ask you at this point to consider whether or not you would be so predisposed not to believe in this type of evidence that you would have difficulty in following any instructions that the Judge might give you with regard to that sort of evidence.

Now, I am going to preface my remark by saying the Judge may or may not instruct on this. I am not saying that the Judge will instruct on it and I am not even saying that that instruction will come in. But I am asking you to tell me if you have an opinion or if you have a predisposition against

this type of evidence that is so strong that it would make it difficult for you or impossible for you to consider the Judge's instructions with regard to this type of evidence. The -- you may remember yesterday that the Judge gave you some instructions on the death penalty phase, and once you find the defendant guilty -- once the defendant is found guilty of first degree murder, then the State must satisfy you beyond a reasonable doubt of certain aggravating factors. Then if, and only if, you believe that there are aggravating factors, you must determine whether or not the mitigating factors are present and whether they outweigh the aggravating factors.

Are you with me so far? Does anyone not understand what I am talking about? We're talking now -- I'm drawing your attention to mitigating factors. And we will attempt to introduce evidence -- and again, I am not forecasting what the Judge will instruct you on, but in the event that you are asked by the Judge to consider whether the defendant was under the influence of a mental or emotional disturbance as a mitigating factor -- this is not in the guilt phase, but as a mitigating factor, I want to know if he were to instruct you to consider that, whether you feel that you would be so opposed to utilizing

mental disturbance as mitigating any act that you convicted him of, whether you would be so opposed to that that you couldn't follow the Judge's instructions on that as a mitigating factor.

So let me ask Mr. Kimbrough, do you feel that if under this circumstance, if you were asked by the Court to consider as a mitigating factor was he subject to a mental or emotional disturbance, do you feel that you would give that some consideration or would you say, on the other hand, no, that just does not make any difference; I am not going to consider that?

MR. KIMBROUGH: Yes, sir, I would consider it.

MR. GALLOWAY: You would consider the mental or emotional disturbance?

MR. KIMBROUGH: Yes, sir.

MR. BREWER: Your Honor, I am going to object to this.

THE COURT: Well, objection is sustained to the length of the statement prior to getting to a question, but you may go forward with your question.

MR. GALLOWAY: Thank you.

Mrs. Clay, let me ask you, would you disregard any evidence in mitigation to the effect

Mr. Kimbrough, do you feel that you could follow those instructions?

MR. KIMBROUGH: Yes, sir.

MR. GALLOWAY: Do you feel that you fully understand those instructions?

MR. KIMBROUGH: Yes, sir.

MR. GALLOWAY: Mrs. Clay, do you feel that you would have any difficulty requiring the State to prove to you beyond a reasonable doubt any aggravating factors in a second phase of the case?

MRS. CLAY: No.

MR. GALLOWAY: Would you then be able to follow the Judge's instructions regarding the burden on the defendant with regard to any mitigating circumstances? Could you -- do you recall the instruction the Judge just gave?

MRS. CLAY: Yes.

MR. GALLOWAY: Do you feel that you would be aided if he would reinstruct on that or do you believe you understand them?

MRS. CLAY: I think I understood it.

MR. GALLOWAY: Okay. Do you believe that you could follow those instructions?

(Mrs. Clay nods head.)

MR. GALLOWAY: Mrs. Batten, do you believe

Connan George saw defendant on 19 October 1984. (Tpp. 1905-06) He paid defendant fifteen dollars for a rifle on that morning. (Tp. 1906) When he saw defendant at his earlier trial, he appeared normal. (Tp. 1907)

Mary Jane Smith saw defendant at her house on 20 October 1984. At that time, he appeared "all right" and not under the influence of drugs or intoxicants. (Tp. 1908) He was, however, in a hurry. (Tp. 1909)

JURY SELECTION ISSUES

I. **THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN PREVENTING DEFENDANT FROM QUESTIONING A PROSPECTIVE JUROR CONCERNING HIS POSITION AS TO THE REQUIREMENT THAT AGGRAVATION MUST BE PROVED TO JUSTIFY A SENTENCE OF DEATH AND PREVENTING DEFENDANT FROM USING HIS CHALLENGES KNOWINGLY AND INTELLIGENTLY, THEREBY DENYING HIS FEDERAL AND STATE CONSTITUTIONAL RIGHTS TO A FAIR TRIAL, DUE PROCESS OF LAW, AND THE HEIGHTENED DEGREE OF RELIABILITY DEMANDED OF CAPITAL PROCEEDINGS.**

Assignment of Error No. 8, Rp. 242
Exception No. 7, Tp. 204
Exception No. 8, Tp. 204
Exception No. 9, Tp. 204

During the early stages of the jury selection proceedings, defendant attempted to question a prospective juror regarding his feelings about the law in the consideration of aggravating circumstances. The trial court sustained the prosecutor's objection to this question and effectively precluded this line of inquiry. (Tp. 204) Defendant indicated his desire to question all prospective jurors on this matter, essentially asking for a live

objection to the court's ruling. *See Duke Power Company v. Winebarger,* 300 N.C. 57, 265 S.E.2d 227 (1980). A trial court may not unduly restrict the efforts of defense counsel to question prospective jurors in an effort to ascertain who might be challenged for cause and to exercise peremptory challenges intelligently. *E.g., State v. Williams,* 286 N.C. 422, 212 S.E.2d 113 (1975). The sixth amendment endows defendant with the guarantee of an impartial jury in accordance with rudimentary due process. *Ristaino v. Ross,* 424 U.S. 589, 595 n.6 (1976). A corollary to the right to an impartial jury is the opportunity to take reasonable steps, primarily through the jury selection process, to ensure juror impartiality. Defendant's challenges to potential jurors, either for cause or peremptory, may well be the most important devices designed to feret out latent prejudices in potential jurors. *See Pointer v. United States,* 151 U.S. 396 (1894). The undue restrictions imposed upon defendant's *voir dire* of potential jurors was particularly egregious in this case since it prevented him from ascertaining whether prospective jurors could follow the law with respect to sentencing. In the context of the present case, the trial court's action constituted reversible error.

David M. Kimbrough was one of the twelve prospective jurors passed to the defense by the prosecution. Near the beginning of defendant's questioning of Kimbrough, he asked whether Kimbrough felt it should be necessary for the state to prove aggravation in addition to premeditated and deliberated murder before he could determine whether to impose a sentence of death. The prosecutor's objection to this question was sustained. Defendant rephrased his inquiry, which was also precluded by the trial court. (Tp. 204) The trial court erred in sustaining the objections since the questions were not designed to "stake out" the juror with respect to a particular verdict or decision that he might make in the particular case. *See State v. Phillips,* 300 N.C. 678, 268 S.E.2d 452 (1980). Rather, the questions were designed to determine if the prospective juror had prejudices or attitudes, latent or otherwise, that might influence

his ability fairly and impartially to consider both aggravating and mitigating evidence in a capital case. Furthermore, whether he thought, as a personal matter, the state should be required to prove aggravation *in addition to* proving a first-degree murder in order to obtain a sentence of death strikes at the heart of his ability to be fair and impartial. The purpose of inquiry during *voir dire* is to eliminate extremism and partiality. *See State v. Honeycutt,* 285 N.C. 174, 203 S.E.2d 844 (1974), *death sent. vacated,* 428 U.S. 903 (1976). Given the capital nature of this case and the importance of jurors being able fairly and impartially to consider mitigating evidence, the inability to conduct reasonable questioning designed to investigate a prospective juror's ability to consider aggravation and mitigation and then weigh them created an unacceptable risk that defendant might receive the death penalty. The risk that an inability to consider the relevant, evidence objectively and impartially may have infected defendant's capital sentencing is unacceptable in light of the ease with which it could have been minimized.

The Supreme Court of the United States applied this notion in the context of jury selection in a capital case. *E.g., Turner v. Murray,* 476 U.S. 28 (1986). *Turner* teaches "that a capital defendant accused of an interracial crime is entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias." *Id.* at 36-37. The court determined this rule was "minimally intrusive" because "the trial judge retains discretion as to the form and number of questions on the subject, including the decision whether to question the venire individually or collectively." *Id.* at 37. Although the court limited its decision to capital sentencing proceedings in which race was likely an issue, the risk attending an inability to consider mitigation in a capital case creates the same "special circumstances" evident in *Turner.* Furthermore, in an earlier decision, the court had found reversible error where a trial court refused to allow a young black defendant, who was charged with possession of marijuana and known as a civil rights activist, to question prospective jurors regarding

racial prejudice. *E.g., Hamm v. South Carolina,* 409 U.S. 524 (1973). In certain circumstances, then, particularly in capital cases, undue restrictions on a defendant's questioning of prospective jurors implicates constitutional rights.

Aside from the constitutional implications of the trial court's ruling in light of *Turner,* the preclusion of this inquiry contravened the basic principles regarding jury selection in this jurisdiction. Recently, the North Carolina Court of Appeals awarded a defendant a new trial based upon restrictions on his *voir dire* of prospective jurors. The trial court had precluded the defendant from inquiring of jurors whether they "felt" that the defendant was guilty because he had a gun in his hand despite what the circumstances surrounding the event might have been. The court concluded that "[a]sking jurors 'Do you feel' questions is qualitatively different from asking jurors 'What would you do?'. Questions dealing with feelings neither stake out, call for speculations, nor require answers to legal questions." *State v. Parks,* 92 N.C. App. 181, 184, 374 S.E.2d 138, 140 (1988), *rev'd,* ___ N.C. ___, 378 S.E.2d 785 (1989). Although this Court reversed on the specific facts involved, it did not dispel the conclusion that:

> the disallowance of the proper voir dire question prevented counsel from inquiring further into the attitudes of jurors and from exercising intelligently peremptory challenges allowed by law.

Id. at 185, 374 S.E.2d at 140-41. Rather, it held that on the facts in *Parks*; the question improperly "asked what kind of a verdict [the juror] would render under certain named circumstances." It also did not dispute the following notion of the Court of Appeals:

> By disallowing the excepted-to voir dire questions, the trial judge prevented defendant from ascertaining whether a challenge for

> cause existed and further prevented defendant from intelligently exercising his peremptory challenges.

Id. at 185, 374 S.E.2d at 141. The jury selection process is certainly an importan method, indeed perhaps the most important method for obtaining information designe to assure defendant an impartial jury. *See generally* Gobert, *In Search of the Impartia Jury*, 79 J. Crim. L. & Criminology, 269, 312-23 (1988). As this Court has explained:

> "The voir dire examination of jurors is a right secured to the defendant by the statutes and has a definite double purpose: First, to ascertain whether there exist grounds for challenge for cause; and, second, to enable counsel to exercise intelligently the peremptory challenges allowed by law."

State v. Allred, 275 N.C. 554, 558-59, 169 S.E.2d 833, 835 (1969) (quoting *State v. Brooks*, 57 Mont. 480, 486, 188 P. 942, 943 (1920)).

The federal courts have been vigilant in protecting a criminal defendant's right adequately to question prospective jurors. Reversible error occurred where *voir dire* was not allowed regarding possible juror acquaintance with particular government witnesses. This restriction on questioning was erroneous because "defendant had a right to have the question asked to afford him an opportunity to exercise his peremptory challenges intelligently." *Cooke v. United States*, 379 F.2d 966, 971 (5th Cir. 1967). Similarly, reversible error occurred where a defendant was precluded from inquiring whether prospective jurors would tend to accord additional credibility to witnesses merely because they were law enforcement officers. *United States v. Baldwin*, 607 F.2d 1295, 1296-97 (9th Cir. 1979). As the Fourth Circuit noted, "these uncertainties prevented [defendant] from meaningfully and intelligently exercising his challenges." *United States v. Brown*, 799 F.2d 134, 136 (4th Cir. 1986); *accord United States v. Jackson*, 542 F.2d 403, 413 (7th Cir. 1976); *United States v. Segal*, 534 F.2d 578, 581 (3rd Cir. 1976).

> [J]urors . . . are "a part of all that [they] have met." Jurors . . . have natural inclinations and favorites, and they sometimes, at least on a subconscious level, give the benefit of the doubt to their favorites. So jury selection, in a real sense, is an opportunity for counsel to see if there is anything in a juror's yesterday or today that would make it difficult for that juror to view the facts, not in an abstract case, but in a particular case, dispassionately. . . . [P]rohibiting defense counsel from questioning potential jurors as to their willingness and ability to follow the judge's instructions limiting their consideration of the defendant's prior record to the issue of his credibility was error . . . .

State v. Hedgepeth, 66 N.C. App. 390, 398, 310 S.E.2d 920, 924 (1984).

Similarly, defendant was entitled to question prospective jurors regarding their attitudes about aggravation and the burden on the state to prove it. Defendant's effort to make this precise inquiry was thwarted by the trial court's ruling. This error was particularly egregious not only because of the capital nature of this proceeding, but also in light of empirical data suggesting that some types of mitigation, despite the presence of aggravation, may lead to the imposition of a life sentence by a jury in capital cases. *See generally* White, *Juror Decision Making in the Capital Penalty Trial*, 11 Law & Hum. Beh. 113 (1987). The actions of the trial court below violated defendant's right to question prospective capital jurors in an effort to ensure fairness and impartiality with respect to the death penalty. *E.g., State v. Adcock*, 310 N.C. 1, 310 S.E.2d 587 (1983); *accord State v. Ziebert*, 34 Or. App. 497, 579 P.2 275 (1978). The questions tendered by defendant, to which the prosecutor's objections were sustained, were in no way repetitious or irrelevant. *E.g., State v. Huffstetler*, 312 N.C. 92, 322 S.E.2d 110 (1984), *cert. denied*, 471 U.S. 1009 (1985).

Quite plainly, the undue restrictions placed upon defendant during his *voir dire* of prospective jurors precluded him from meaningfully and intelligently exercising his peremptory challenges. Furthermore, it blocked his efforts to uncover latent prejudices in the form of juror inability fairly and impartially to consider the relevant factors in

aggravation and mitigation in a capital proceeding. An unacceptable risk exists, in light of the broad discretion accorded defendant's jury and the special seriousness attending any capital case, that the inability fairly to consider relevant the appropriate sentencing factors infected the sentencing proceeding. Under the dictates of *Turner* and the general principles regarding jury selection proceedings in this jurisdiction, defendant's conviction must be reversed.

II. THE PROSECUTOR UNCONSTITUTIONALLY EXERCISED PEREMPTORY CHALLENGES TO EXCLUDE JURORS WHO EXPRESSED EVEN THE SLIGHTEST RESERVATIONS ABOUT IMPOSING THE DEATH PENALTY, THEREBY DENYING DEFENDANT HIS CONSTITUTIONAL RIGHTS TO AN IMPARTIAL JURY, A FAIR TRIAL, DUE PROCESS OF LAW, AND FREEDOM FROM CRUEL AND UNUSUAL PUNISHMENT.

Assignment of Error No. 2, Rp. 63
Exception No. 5, Tp. 103
Exception No. 6, Tp. 157
Exception No. 12, Tp. 482

During the jury selection proceedings, the prosecutor exercised three peremptory challenges to excuse potential jurors who expressed some hesitancy about being able to return a death sentence. (Tpp. 103, 157, 482) This process systematically denied defendant his federal and state constitutional rights to be tried by an impartial jury and one composed of a fair cross-section of the community. U.S. Const., amend. VI. By depriving defendant of an impartial and representative jury, this process implicates his constitutional protection of freedom from cruel and unusual punishment by denying him a capital proceeding afforded the heightened reliability demanded by the eighth amendment. In doing so, it "produced a jury uncommonly willing to

No. 585 A 87 NINTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

STATE OF NORTH CAROLINA
v.
RICKY LEE PRICE

From Person

DEFENDANT-APPELLANT'S SUPPLEMENTAL BRIEF

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C. **The Unconstitutional Restrictions On Defendant's Voir Dire Cannot Be Deemed Harmless Beyond A Reasonable Doubt.**

Having established the existence of federal constitutional error, the prosecution bears the substantial burden of demonstrating this error was harmless beyond a reasonable doubt. N.C. Gen. Stat. §15A-1443(b); *see Chapman v. California*, 386 U.S. 18 (1967). The trial court plainly sustained consistent objections to defendant's repeated efforts to inquire into the abilities of various prospective jurors to consider fairly the evidence in the context of the North Carolina capital sentencing process. (Tpp. 182-83, 190, 203, 283, 323) Defendant was specifically thwarted in his efforts to ask David Kimbrough if he would consider it important and necessary for the prosecution to prove aggravating factors in addition to a premeditated and deliberate murder before he would recommend the sentence of death. (Tpp. 182-83) Kimbrough eventually sat on defendant's jury and, in fact, served as the foreperson. [App. 1] As in *Morgan*, the seating of a juror whom defendant was precluded from questioning in a constitutionally permissible fashion requires relief.

As with Kimbrough, defendant made an effort to question prospective juror Rollie D. Long regarding whether he would require the prosecution to show aggravating factors before he would vote for the death penalty. The trial court sustained the prosecutor's objection to defendant's question to Long regarding whether he would "require the State to show aggravating [factors] before you would vote for the death penalty?" (Tp. 323) Long also sat on defendant's jury.

It is also significant that the prosecution engaged prospective jurors in inquiries about their feelings and attitudes toward capital punishment. Indeed, the prosecutor told prospective jurors, "it is appropriate for the State to ask you about your feelings

about the death penalty and whether or not that would affect your deliberations in this case." (Tp. 71) The prosecutor proceeded to question prospective jurors frequently about their feelings and attitudes toward capital punishment. (Tpp. 77-79, 87, 89, 105, 107, 127-28, 163) Assuming these questions are permissible both to allow the state to exercise intelligent challenges for cause and to make reasonable decisions about the use of its peremptory challenges, defendant is entitled to a similar opportunity. Because he did not receive such a similar opportunity, the constitutional error in this case cannot be deemed harmless beyond a reasonable doubt.

Morgan establishes that it is no longer sufficient, consistent with due process, merely to ask prospective jurors if they would follow the law in a capital case. Rather, a defendant must be able to "specifically inquire of each prospective juror" whether that individual would be inclined automatically to impose a sentence of death upon defendant's conviction for first degree murder. *United States v. Escobar*, 803 F. Supp. 611, 617 (E.D.N.Y. 1992). The rationale behind this emerging constitutional principle hinges partially on the phenomenon that jurors misunderstand trial court instructions in capital sentencing proceedings. This misunderstanding is becoming a pervasive problem. *Id.* at 618. Given this potential for misunderstanding the law, it is imperative for a capital defendant to be able to inquire fully and completely about a prospective juror's understanding of each aspect of the capital sentencing process and that person's personal and individual ability to follow each aspect of the law.

> Jurors - whether they be unalterably in favor of or opposed to the death penalty in every case - by definition are ones who cannot perform their duties in accordance with the law, their protestations to the contrary notwithstanding.
>
> . . . [S]uch jurors could in all truth and candor respond affirmatively, personally confident that such dogmatic views are fair and impartial, while leaving

> the specific concern unprobed. . . . It may be that a juror could, in good conscience, swear to uphold the law and yet be unaware that maintaining such dogmatic beliefs about the death penalty would prevent him or her from doing so. A defendant on trial for his life must be permitted on *voir dire* to ascertain whether his prospective jurors function under such misconception.

Morgan, 119 L.Ed.2d at 508. As in *Morgan*, defendant was entitled to probe the beliefs and attitudes of prospective jurors to ascertain if any one of them harbored such a bias in favor of death or a particular revulsion to first degree murder so that the prospective juror would be substantially impaired in the ability to consider a life sentence once the prosecution proved a premeditated and deliberate murder. Defendant did not receive that opportunity in this case. Since several prospective jurors to whom he posed relevant and constitutionally required questions sat on his jury, the error cannot be deemed harmless beyond a reasonable doubt. Accordingly, the judgment against defendant must be vacated.

A Well, one time I went there because I couldn't get along with my momma and daddy, and I was disrespecting them.

Q You still insist that you did not kill Brenda Smith?

A I didn't kill her or Joan.

Q You were with her when she made a telephone call to her mother at 8:42 a.m.?

A I didn't know -- I didn't deny going and picking her up and going off with her and her calling her mother.

Q And she was dead an hour and a half later and her car was seen at the scene and yet you say you had her car?

A I was driving her car.

Q You were driving her car?

A I took her to work.

Q You used to farm down in that area some, didn't you, for one of your uncles or cousins?

A I -- it wasn't Person County. It was Semora, North Carolina.

Q That was for Lawrence Terry?

A In Semora, yeah.

Q In Person County?

A Semora's not in Person County. That's like

on the person.

Q So if there are days -- so when the defendant is not on Lithium, he can be dangerous?

A Yes.

Q Did the defendant tell you that he killed the two girls particularly the girl Brenda Leigh Smith?

A Sort of.

Q What did he say in that regard?

A He said that -- relating to Joan -- is it Bates?

Q Joan Brady was the girl killed in Virginia and Brenda Smith was the girl killed two days later.

A Thank you. I'm abbreviating this as J.B. here, Joan B. He said that there was a series of minor arguments, boyfriend-girlfriend. Washing clothes. She threw beer at me. I slapped her twice and she threatened to lock me up. She hit my head on the door. I pushed her or grabbed her. I went to the bathroom and came out. Threw her into the bed. She was strangled. I tied her hands behind her back after she was dead. I was going to tie her like an indian movie. She was dead or the word dead after that. That's what he told me about it.

Q Uh-huh. Now, that was Joan?

A Yes.

Q What about the girl who was found in Person

County for which he is presently charged?

Brenda Smith?

A After (indicating) being with her for a day or so, he talks about stopping the car on the side of the road. It was daylight. I put a rag on the rear-view mirror, went walking with Brenda to find a place to have sex. Whenever we did she took her rings off. After we had made love she wanted something to drink. We went to a gas station. She called her mother. I don't remember the argument. Being in a car with her. I went to sleep in the car. She said she had to be at the bowling alley. That was one explanation and then I got another one.

Here it is, I'm sorry. Down below. Ah, she was planning to marry soon. She didn't know that I didn't have a divorce. She started acting crazy, doing -- dating someone before. Said -- apparently said to him, "I was like all the rest. I didn't care about her." And he said I just spent two hundred dollars on her at Busch Gardens the week before. Brenda came back to the car crying and I grabbed her. We were playing -- playing to start. I played too rough. She was lying there dead. I didn't know what to tell her about being married.

Q He grabbed her in the car and he was too rough

PENGAD/INDY MUNCIE IN 47302
SF-2004

and she was dead; is that --

A Yes.

Q Have you been told the facts as to how the deceased was found at the scene? Did the attorneys tell you that the girl was found some distance off the road in a wooded area, face down with her hands tied behind her back with shoelaces?

A Yes, they did.

Q And that the Brady girl was found the same way?

A Yes.

Q And you would agree then that the defendant was not being totally candid with you in his description of what ocurred?

A Yes. Yes. There was no question in my mind that he was not being toally candid because I couldn't find out what he was thinking or exactly what happened which was the --

Q And he would not tell youwhat happened considering as the facts as they were photographed and found by the police to be?

A He didn't trust me enough to tell me much of anything and then he later backed out of this story and said, "No, it didn't happen that way." So I didn't get any information about his thinking process. The

issue that I was originally asked about was his mental state at the time of the crime, and in order to do that you have to have the person tell you what they are thinking at that moment. And I tried very hard to get it and could not.

Q And of course yesterday you were not present in court when the defendant testified?

A No.

Q And he denied killing the girls yesterday. Would -- he would have been lying to the court then at that time or he was lying to you when he said he did?

A No doubt, yes.

Q So some of the facts which the defendant related to you, part of which you based your diagnosis on, were lies?

A Well, those aren't the facts, those are the lies. If you are saying does the defendant lie, yes he does.

Q And the defendant lied to you?

A Yes.

Q All right.

A I think the answer is yes, counsel. It's hard to know on each statement whether it's a lie or truth. Certainly when he told me he didn't kill them and

PENGAD/INDY, MUNCIE IN 47308 SP-2084

No. 93-7348

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1993

RICKY LEE PRICE,

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent.

RECEIVED
JAN 31 1994
OFFICE OF THE CLERK
SUPREME COURT, U.S.

CERTIFICATE OF SERVICE

I, Barry S. McNeill, a member of the bar of this Court, hereby certify that on the 28th day of January, 1994, one copy of the State of North Carolina's BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA, along with the APPENDIX, was served on the Petitioner's counsel of record, Mr. Gordon Widenhouse, Assistant Appellate Defender, Office of the Appellate Defender, 1905 Meredith Drive, Durham, North Carolina 27713, by first class mail, postage prepaid. I further certify that all parties required to be served have been served.

This the 28th day of January, 1994.

Barry S. McNeill*
Special Deputy Attorney General

Post Office Box 629
Raleigh, North Carolina 27602
(919) 733-3109

*COUNSEL OF RECORD

MICHAEL F. EASLEY
ATTORNEY GENERAL

State of North Carolina
Department of Justice
P. O. BOX 629
RALEIGH
27602-0629

January 28, 1994

Honorable William K. Suter
Clerk, Supreme Court of the United States
1 First Street, N.E.
Washington, D.C. 20543

ATTN: Cynthia Rapp

Re: Ricky Lee Price v. State of North Carolina, No. 93-7348
(BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA)

Dear Mr. Suter:

Enclosed for filing are an original and twelve copies of the State of North Carolina's BRIEF IN OPPOSITION to the Petition for Writ of Certiorari filed by Ricky Lee Price, and supporting APPENDIX. Also enclosed are the required Affidavit of Mailing affirming that this BRIEF IN OPPOSITION was mailed timely on Friday, January 28, 1994, along with a Certificate of Service to opposing counsel.

Thank you for your assistance in filing these documents and bringing them to the attention of the Court. Under cover of this letter, I am serving Price's counsel with a copy of the State's BRIEF IN OPPOSITION and supporting Appendix.

Sincerely,

Barry S. McNeill
Special Deputy Attorney General

BSM/dd

cc: Mr. Gordon Widenhouse

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No. 93-7348

IN THE
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RICKY LEE PRICE,

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STATE OF NORTH CAROLINA,

Respondent.

AFFIDAVIT OF MAILING

I, Barry S. McNeill, being duly sworn, do depose and say:

1. I am counsel of record for the State of North Carolina in this action, and am a member of the bar of this Court.

2. On Friday, January 28th, 1994, at approximately 4:00 p.m., I placed the original and twelve copies of the State of North Carolina's BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA, along with the Appendices, in a properly secure package, addressed to the Clerk of the Supreme Court of the United States, with proper postage affixed (first class postage prepaid), and deposited the package in a mailbox under the exclusive care and custody of the United States Postal Service at the corner of Wilmington and Morgan Streets, Raleigh, North Carolina.

3. To my personal knowledge, this mailing took place within the time permitted under Supreme Court Rules 15.2, 29.2 and 30.4.

This the 28th day of January, 1994.

Barry S. McNeill
Special Deputy Attorney General

Sworn to before me this the
28th day of January, 1994.

Donna R. Douglas
NOTARY PUBLIC

My Commission Expires 12-21-98.

RECEIVED
JAN 31 1994
OFFICE OF THE CLERK
SUPREME COURT, U.S.